No. 92-7549-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
February 5, 1993

Title: Thomas Schiro, Petitioner
v.
Robert Farley, Superintendent, Indiana State Prison, et al.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Foster,Monica

Counsel for respondent: Pearson,Linley E., Uhl,Wayne E.

Entry	Date	Note	Proceedings and Orders
1	Nov 30 1992	G	Application (A92-438) to extend the time to file a petition for a writ of certiorari from December 7, 1992 to February 5, 1993, submitted to Justice Stevens.
2	Dec 1 1992		Application (A92-438) granted by Justice Stevens extending the time to file until February 5, 1993.
3	Feb 5 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Apr 22 1993		Brief of respondents Richard Clark, Superintendent, et al. in opposition filed.
6	Apr 29 1993		DISTRIBUTED. May 14, 1993
7	Apr 30 1993	X	Reply brief of petitioner filed.
9	May 17 1993		Petition GRANTED.
			**********
10	Jun 1 1993	G	Motion of petitioner for appointment of counsel filed.
11	Jun 14 1993		Motion for appointment of counsel GRANTED and it is ordered that Monica Foster, Esq., of Indianapolis, Indiana, is appointed to serve as counsel for the petitioner in this case.
12	Jun 14 1993	G	Motion of petitioner to enlarge the record filed.
14	Jun 17 1993		Order extending time to file brief of petitioner on the merits until July 13, 1993.
15	Jun 28 1993		Motion of petitioner to enlarge the record GRANTED.
16	Jul 9 1993		Joint appendix filed.
17	Jul 13 1993		Brief of petitioner Thomas Schiro filed.
19	Jul 29 1993		Order extending time to file brief of respondent on the merits until September 1, 1993.
20	Sep 1 1993		Brief of respondents Robert Farley, Superintendent, et al. filed.
21	Sep 9 1993		CIRCULATED.
22	Sep 10 1993		SET FOR ARGUMENT MONDAY, NOVEMBER 1, 1993.(2ND CASE).
24	Sep 30 1993	X	Reply brief of petitioner filed.
23	Oct 1 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
25	Oct 18 1993		Record filed.
		*	Original proceedings United States District Court, Northern District of Indiana (2 Boxes)
26	Nov 1 1993		ARGUED.

Cause No. 92-7549

ORIGINAL

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

THOMAS N. SCHIRO,

Petitioner,

v.

RICHARD CLARK, Superintendent, Indiana State Prison, et. al.,

Respondents.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Petition for Writ of Certiorari

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Question Presented for Review

Whether double jeopardy and collateral estoppel prohibit the State from proceeding to a death penalty phase when the jury has acquitted the defendant in the guilt phase of the offense which the State is required to prove beyond a reasonable doubt in order to sustain the death sentence?

Parties to the Action

The names of all parties to the action in the lower court appear in the caption to this case.

TABLE OF AUTHORITIES

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I. OPINIONS OF OTHER COURTS

On August 5, 1983 the Indiana Supreme Court issued an opinion on direct appeal affirming, by a 3-2 majority, Schiro's convictions and death sentence. Schiro v. State , 451 N.E.2d 1047 (Ind. 1983). Certiorari was then denied by this Court. Schiro v. Indiana, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983).

On June 28, 1985 the Indiana Supreme Court issued an opinion, affirming by a 3-1 majority, the denial of state post-conviction relief. Schiro v. State, 479 N.E.2d 556 (Ind. 1985). Certiorari was then denied by this Court. Schiro v. Indiana, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986).

On February 8, 1989 the Indiana Supreme Court issued an opinion affirming, by a 3-2 majority, the denial of state post-conviction relief. Schiro v. State, 533 N.E.2d 1201 (Ind., 1989). Certiorari was then denied by this Court. Schiro v. Indiana, 493 U.S. 910, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989).

On December 26, 1990 the district court issued an opinion denying habeas relief. Schiro v. Clark, 754 F. Supp. 646 (N.D.Ind. 1990). On May 8, 1992 the Seventh Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief. Schiro v. Clark, 963 F.2d 962 (7th Cir., 1992). Rehearing and Suggestion for Rehearing En Banc was denied, without opinion, by the Circuit Court on September 8, 1992.

On December 1, 1992 Mr. Justice Stevens extended the time for filing this Petition for Writ of Certiorari to and including February 5, 1993.

II. JURISDICTIONAL STATEMENT

The jurisdiction of this Court to entertain petitions for certiorari from the affirmance of

the denial of habeas corpus relief is invoked pursuant to 28 U.S.C. § 1254(1) and United States Supreme Court Rule 10.

III. CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT 14

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATE STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Indiana Code 35-41-2-2

(a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

(d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

Indiana Code 35-42-1-1

A person who:

(1) knowingly or intentionally kills another human being; or

(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery;

commits murder, a felony.

Indiana Code 35-50-2-9

This provision of the state code sets forth the death penalty provisions of state law and is reprinted in the appendix to this petition.

IV. STATEMENT OF THE CASE

Schiro was originally charged with three counts of murder for the death of a single victim: Count 1, "knowing" murder; Count 2, felony murder (rape); and Count 3, felony murder (criminal deviate conduct).[1] The State additionally alleged the existence of two aggravating circumstances to support its request for the death penalty: an intentional killing in the course of a rape, and an intentional killing in the course of criminal deviate conduct. Under Indiana law, before the jury may weigh the aggravating circumstances against the mitigating

[1] Indiana Code 35-42-1-1 defines murder. It provides that: "[a] person who: (1) knowingly or intentionally kills another human being; or (2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, rape or robbery; commits murder, a felony."

circumstances, the State must prove the existence of each element of at least one aggravating circumstance beyond a reasonable doubt. Ind. Code 35-50-2-9(e)(1).

At trial, Schiro raised a special plea of not responsible by reason of insanity. In part because of this, the jury was given ten (10) possible verdict forms at the close of the guilt phase.[2]

The jury returned one "guilty" verdict. They found Schiro guilty of Count II, felony murder (in the course of a rape). This charge required no *mens rea* as to the killing - the only *mens rea* element applied to the intent to commit the underlying felony. The jury did not return a verdict on the murder charge which required an intent to kill (Count I). Nevertheless, the case proceeded to the penalty trial on the charged aggravators (both of which required the State to prove beyond a reasonable doubt that the killing was intentional).

After deliberating for sixty-one (61) minutes, the jury returned with their unanimous recommendation: the death penalty was not appropriate for Thomas Schiro. Approximately 18 days later, Schiro stood before the court for sentencing.[3] Within minutes, the considered judgement of twelve members of the community was overridden and Schiro was sentenced to death.

Prior to the direct appeal decision in this case the Indiana Supreme Court found the

[2] The verdict forms provided were: (1) Guilty as charged on Count I; (2) Guilty as charged on Count II; (3) Guilty as charged on Count III; (4) Guilty of the lesser included offense of "voluntary manslaughter"; (5) Guilty of the lesser included offense of "involuntary manslaughter"; (6) "Not guilty"; (7) Not guilty by reason of insanity; (8) Guilty of "Murder", but mentally ill; (9) Guilty of voluntary manslaughter, but mentally ill; and (10) Guilty of involuntary manslaughter, but mentally ill.

[3] Indiana is one of only three states that permits the judge to override a jury's recommendation as to punishment; the other states are Florida and Alabama.

"original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty." Schiro v. State, 451 N.E.2d at 1056. Thus, the Indiana Supreme Court ordered the trial court to submit new reasons justifying imposition of the death sentence. Id.

Schiro's case has been before the Indiana Supreme Court three times. There was never a unanimous affirmance[4]: the vote on direct appeal was 3-2; the vote on first post-conviction appeal was 3-1; and the vote on second post-conviction appeal was 3-2.

Schiro alleges herein that his constitutionally guaranteed right to be free from being twice put in jeopardy was violated at his capital trial. The violation occurred when the State was permitted to proceed to the penalty phase of his capital trial after the jury had acquitted him of a "knowing" killing. The two aggravating circumstances alleged by the State were the only two that were arguably present in this case. Yet, both of these aggravating circumstances required the State to prove beyond a reasonable doubt that the defendant entertained an "intentional" state of mind when he committed the killing. Under state law a person cannot act "intentionally" without also acting "knowingly".

Schiro first raised the claim contained in this petition in his second state post-conviction relief petition. By a 3-2 vote, the Indiana Supreme Court denied relief on the merits. In so holding, the court stated:

> The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and

[4] Mr. Justice Stevens has stated that each time the state appellate court reviewed this case, the sentence was affirmed by a "bare majority" of the court. Schiro v. Indiana, 110 S. Ct. 268 at 269 (1989) (Stevens, respecting the denial of cert.).

> remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under I.C.35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to I.C. 35-50-2-9, *and the jury determined that the aggravating circumstance existed and that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct.* In the same statute, §(9)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made his.

Schiro v. State, 533 N.E.2d at 1208 (Ind. 1989) [emphasis added].

The state court is in error when it notes that the jury determined that the aggravating circumstance existed. In fact, the jury never made such a finding. The jury acquitted Schiro at the guilt phase of the only murder charge which contained a *mens rea* element. The jury then unanimously recommended *against* the death penalty.

Justices DeBruler and Dickson dissented on this claim and held that Schiro was entitled to post-conviction relief in the form of a new sentence of years upon the conviction of felony murder. In so holding the dissenters noted:

> The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. Buckner v. State (1969) 252 Ind. 379, 248 N.E.2d 348, Smith v. State (1951) 229 Ind. 546, 99 N.E.2d 417.
>
> ...In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. [citation omitted] The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can

be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

Id. at 1208-1209 (DeBruler, J., dissenting).

Mr. Justice Stevens issued an opinion "respecting the denial of the petition for writ of certiorari" after the denial of Schiro's second state post-conviction action. Mr. Justice Stevens' opinion was directed to the double jeopardy claim raised and addressed on the merits in the Indiana Supreme Court and presented herein at page 8. In that opinion, Justice Stevens implied that this Court was denying *certiorari* because of its heavy docket and the knowledge that the issue would again be presented to the Court following federal review. Justice Stevens stated:

> It cannot be disputed that petitioner was placed in jeopardy within the meaning of the Fifth Amendment to the Federal Constitution when the trial on Count I commenced. [Citation omitted]. The fact that Indiana may not consider the jury's silence an "acquittal" as a matter of state law surely does not determine the constitutional question whether he could again be placed in jeopardy on the same charge. [citation omitted]. Nor does it determine whether the action by the jury--especially when illuminated by its unanimous decision at the penalty hearing--should be given preclusive effect either under the principles of double jeopardy in capital cases ...[citation omitted], or under more general principles of collateral estoppel.

Schiro v. Indiana, 493 U.S. 910, 110 S.Ct. 268 at 268, 107 L.Ed.2d 218 (1989).

After discussion of Schiro's double jeopardy claim, Mr. Justice Stevens stated:

> These, as well as the other federal questions that petitioner has raised in the state courts, are open to and will presumably receive careful consideration from the federal court with habeas corpus jurisdiction over the case. (footnote omitted)

Schiro v. Indiana, 110 S.Ct. 268 at 270 (Stevens, respecting the denial of petition for certiorari).

The jurisdiction of the federal courts was invoked pursuant to 28 U.S.C. § 2254. Both the federal district court and circuit court of appeals denied relief on this claim finding that the silent verdicts did not constitute an acquittal under state law. Schiro v. Clark, 754 F. Supp. at

660; Schiro v. Clark, 963 F.2d at 970. Neither of these courts mentioned the plethora of state court cases dating back to 1844 which are cited herein at pages 11-12 and which hold that a silent verdict *is* an acquittal in Indiana.

Schiro now requests that this Court grant him the careful consideration that Mr. Justice Stevens presumed would be forth coming from the federal courts with habeas corpus jurisdiction.

V. REASONS FOR GRANTING THE WRIT

This Court should grant the writ because Schiro's death sentence was barred by double jeopardy and collateral estoppel in violation of the United States Constitution, Amends. V, VIII, and XIV. The decisions of the United States Court of Appeals for the Seventh Circuit and the Indiana Supreme Court are such a severe departure from this Court's precedent in Arizona v. Rumsey, 467 U.S. 203, 104 S. Ct. 2305, 81 L.Ed.2d 164 (1984); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1980); Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); and Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) that this Court should grant the writ to correct the misinterpretation of those cases.

Both the district court and the court of appeals relied in part on Spaziano v. Florida, 468 U.S. 447,104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) to dismiss Schiro's constitutional challenge to the imposition of the death penalty in his case. The lower courts' reliance upon Spaziano is incorrect because the critical event in this case occurred not when the jury returned its unanimous recommendation against imposition of the death penalty, but when the jury acquitted Schiro of Counts I and III in the *guilt phase*. The court below was unquestionably correct when it noted that Spaziano stands for the general proposition that a state law is not *per se*

unconstitutional just because it permits a trial judge to impose a death sentence over a jury recommendation of life. The Seventh Circuit erred, however, by assuming that Spaziano somehow preempts all other constitutional protections, and permits a judicial override regardless of the facts of the case. This proposition is simply incorrect. A judicial pronouncement of death which on its face violates the Double Jeopardy Clause, is not cured of constitutional infirmity by Spaziano's theoretical approval of override statutes.

A. WHEN DOES JEOPARDY ATTACH?

Jeopardy attached when Thomas Schiro's jury was sworn. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed. 2d 24 (1978); In Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); Tyson v. State, 543 N.E.2d 415 (Ind. 1989); Indiana Code 35-41-4-3(2).

B. THE CRITICAL EVENT

The dispositive event in this case occurred when the jury returned their verdict at the close of the *guilt phase*. Schiro was charged with three counts of murder, all arising from a single death: Count I, "knowing" murder[5]; Count II, felony murder (rape); and Count III, felony murder (criminal deviate conduct).[6]

The jury was presented with ten (10) different verdict forms.[7] Three of these forms separately provided for a finding of "guilty as charged" on Counts I-III, respectively. Only one (1) general verdict form was provided for a "not guilty" verdict. The jury was not provided

[5] Under Indiana law " [a] person engages in conduct 'knowingly' if, when he engages in the conduct he is aware of a high probability that he is doing so." Indiana Code 35-41-2-2(b). Under Indiana law "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so. Indiana Code 35-41-2-2(a).

[6] The definitions of murder as provided by state law are contained in footnote 1, supra.

[7] The verdict forms submitted are set forth in footnote 2, supra.

with three (3) separate verdict forms for "not guilty" on each of the charges contained in Counts I-III.

Since the jury was only presented with a single "not guilty" verdict form that covered all three counts, the only way for the jury to demonstrate that it found Schiro guilty of Count II, and not guilty on Counts I and III, was to return the Count II "guilty" verdict form alone. If it returned the "not guilty" form, reasonable jurors could assume that action could be interpreted to mean that they found Thomas Schiro both guilty and not guilty of Count II.

After deliberating for over five (5) hours, the jury returned a single verdict: it found Schiro guilty of Count II, felony murder (rape). It impliedly acquitted Schiro of both Count I, murder (the only charge which required proof of intent to kill), and Count III, felony murder (criminal deviate conduct). These verdicts are important in this case because the two aggravators charged by the State required the State to prove beyond a reasonable doubt that the killing was intentionally committed.

1. Was there an implied acquittal?

The failure to return a verdict on Counts I ("knowing" murder) and III (felony murder, criminal deviate conduct) amounted to an implied acquittal under Indiana and federal law. The Circuit Court found that "[i]n order to assess the effect of the jury's findings, this Court looks to State law." (citation omitted) Schiro v. Clark, 963 F.2d 962, 970 (7th Cir. 1992). In rejecting Schiro's double jeopardy claim, the panel concluded that a silent verdict on the "knowing murder" count "did not amount to an acquittal under state law." Id.

Irrespective of whether state or federal law controls, a silent verdict is the legal equivalent of an acquittal. Both require the conclusion that the facts yield an implied acquittal.

(a) Federal Law. While the panel opinion finds state law to be controlling on whether a silent verdict is an implied acquittal, Schiro notes that previous decisions of this Court have held federal standards, not state, apply. Crist v. Bretz, supra; Benton v. Maryland, supra.

In Green v. United States, supra, the defendant was charged with first degree murder. The jury convicted him of the lesser offense of second degree murder, but was silent as to the first degree murder charge. Green's conviction of second degree murder was reversed on appeal due to trial error. He was subsequently convicted of the original first degree murder charge. This Court held that the double jeopardy clause barred retrial on that charge. In so holding this Court noted:

> [T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. *Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense....In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."*

Id. at 191, 78 S. Ct. at 225 (emphasis added).

(b) Indiana Law. Even if state law controls, the silent verdict amounts to an acquittal. Where at least one verdict is returned in a multi-count charge and the jury remains silent on the remaining counts, the "silent verdict" amounts to an acquittal under the Indiana Constitution. Weinzorpflin v. State, 7 Blackf. 186, 194 (Ind. 1844) (Where defendant charged with 3 counts and the jury returned a guilty verdict on Count I, and was silent as to the remaining counts, Indiana Supreme Court held, interpreting "our own constitution," that "as to [the silent] counts,

the proceeding against him are equivalent to an express verdict of not guilty...") See also Buckner v. State, 253 Ind. 379, 248 N.E.2d 348, 351 (1969) ("Silence of the court on Count I is equivalent to a verdict of acquittal."); Smith v. State, 229 Ind. 546, 99 N.E.2d 417, 418 (1951) (same); Dawson v. State, 65 Ind. 442, 443-44 (1879) ("[N]o express finding was had upon second count. This was a legal acquittal of the larceny, and leaves the case before us the same as if the second count of the indictment was not in the record."); Bonnell v. State, 64 Ind. 498, 499 (1878) ("[T]he verdict of the jury was entirely silent as to the second count of the indictment. This silence of the verdict was equivalent to an express verdict of not guilty as to the second count of the indictment."); Short v. State, 63 Ind. 376 (1878) (same); Bittings v. State, 56 Ind. 101 (1877) (same). See also, Tinker v. State, 549 N.E.2d 1065 (Ind. 1990) (same).

Schiro's case represents the only time that the state courts have held that a silent verdict represents anything other than an acquittal. Such a result creates an independent due process violation. Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). Where, as here, the State provides that a silent verdict constitutes an acquittal, a defendant has a substantial and legitimate expectation that he will be deprived of his liberty, and indeed his life, only consistent with that rule of law. It is a liberty and life interest which the Fourteenth Amendment preserves against arbitrary deprivation by the State. Id. The State simply cannot create rules of law which it applies to all accused persons but one.

Thus, Schiro has established that under federal or state law, the jury's silence on the "knowing" killing was tantamount to an acquittal. As in Green, the jury's verdict must be interpreted as though it expressly stated: "We find the defendant not guilty of knowing murder

and felony murder (with criminal deviate conduct) but find him guilty of felony murder (rape)."

2. *Effect of the Implied Acquittal on the Death Penalty*

The acquittals on Counts I and III are directly linked to charged aggravation. The two aggravating circumstances alleged by the State in support of its request for the death penalty were: (1) the intentional k...g during a rape; and (2) the intentional killing during criminal deviate conduct. I.C. 35-50-2-9(b)(1). In order to properly sentence Schiro to death on the charged aggravating factors, the trier(s) of fact[8] had to determine that Schiro "intentionally" killed. Schiro could be lawfully sentenced to death only if the state proved beyond a reasonable doubt that the killing was "intentional" and committed during the course of or during the attempt to commit rape or criminal deviate conduct. I.C. 35-50-2-9(b)(1), Tr.R. 52-53.

The distinction between the "intentional" element necessary to support a death verdict and the "knowing" element which was contained in the charge on Count I is set out by state statute. Under state law "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." I.C. 35-41-2-2(a). "A person engages in conduct 'knowingly' if, when he engages in the conduct he is aware of a high probability he is doing so." I.C. 35-41-2-2(b). The "intentional" state of mind requires even greater proof than a "knowing" state. Case v. State, 458 N.E.2d 223, 225 (Ind. 1984). In Trevino v. State, 428

[8] In Indiana the jury hears the evidence at the penalty phase. It issues a recommendation to the court regarding sentencing. The court then ultimately determines the appropriate sentence. The court must base its sentence on the same standards the jury was required to consider. Ind. Code 35-50-2-9(e). In 1989, the Indiana Supreme Court for the first time "develop[ed] a standard appropriate to the separate roles of judge and jury." Chavez v. State, 534 N.E.2d 731, 734 (Ind. 1989). "In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime. Id. at 735.

N.E.2d 263, 267 (Ind. App. 1981) the court stated: "The highest degree of culpability is 'intentionally.' If conduct is engaged in 'intentionally,' it necessarily follows that it must be engaged in 'knowingly' also." As Justice DeBruler noted in his dissenting opinion from the affirmance of Schiro's second state post-conviction action:

> The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

Schiro v. State, 533 N.E.2d 1201, 1209 (Ind. 1989)(DeBruler, dissenting).

Since the jury had already determined that Schiro did not possess the requisite intent to kill by virtue of their implicit acquittal on Count I at the guilt phase[9], it is not at all surprising that the twelve (12) member jury unanimously recommended against the death penalty in sixty-one (61) minutes.[10] While the jury's unanimous decision to recommend against the death penalty is noteworthy, it is not dispositive of this issue. The important fact is the acquittal at the *guilt* phase, and the fact that the acquitted offense and the facts supporting the crime upon

[9] The fact that the jury concluded that the State failed to prove the *mens rea* element of the offense is established by their implicit acquittal on Count I and the conviction on Count II. The jury obviously found that Schiro had killed the decedent as evidenced by their conviction on Count II. Both Count I and Count II require the State to prove that the defendant killed another person. The only element which is contained in Count I that is not contained in Count II is the *mens rea* requirement.

[10] In addition to acquitting Schiro of Count I (knowing murder) at the guilt phase, the jury also acquitted Schiro on Count III, felony murder (criminal deviate conduct). Criminal deviate conduct was also an element of one of the charged aggravators. I.C. 35-50-2-9(b)(1). The guilt phase acquittal on Count III, in conjunction with its acquittal on Count I, also amounts to an acquittal of the charged aggravator which required the State to prove beyond a reasonable doubt that Schiro intentionally killed the decedent while committing or attempting to commit criminal deviate conduct.

which the acquittal rests, were the sole statutory basis used by the trial court in imposing death. In essence, the acquittal required a termination of the proceedings after the verdict of guilty on Count II; required the judge to sentence Schiro on that Count; and prohibited consideration and imposition of the death penalty.

C. PRINCIPLES OF DOUBLE JEOPARDY & COLLATERAL ESTOPPEL REQUIRE THIS COURT TO VACATE THE DEATH SENTENCE

1. Double Jeopardy

The historical underpinnings of the double jeopardy prohibition are most eloquently described in the oft-quoted passage from Green v. United States, supra:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187, 78 S.Ct. at 223.

In Bullington v. Missouri, 451 U.S. 430, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) this Court explained the applicability of the above considerations in the capital sentencing process:

> The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,'...thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.' [citation omitted].
>
> It is well established that the penalty phase of a capital trial, whether it be before judge

or jury, is a "trial" for double jeopardy purposes. Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). Bullington, supra.[11] The facts at issue herein are even more compelling than the above-cited cases because Schiro was acquitted at the *guilt phase* of trial. Schiro was thrice put in jeopardy on the issue of intent: at the guilt trial; at the penalty trial before the jury; and at the sentencing trial before the judge. The double jeopardy clause of the United States Constitution simply does not permit an accused person to be put in jeopardy twice, much less three times[12].

2. Collateral Estoppel

It is firmly established that collateral estoppel applies to criminal prosecutions as an element of the double jeopardy clause of the 5th Amendment. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The doctrine of collateral estoppel "has the dual

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[11] As with the Missouri death penalty statute at issue in Bullington and the Arizona statute in Rumsey, Indiana's death penalty sentencing scheme (before the penalty jury and sentencing judge) also has the hallmarks of a trial: the state must prove the aggravating circumstance(s) beyond a reasonable doubt [I.C. 35-50-2-9(b)]; the defendant has the right to confront and cross-examine witnesses the state claims supports the aggravating circumstances (Id.); the defendant has the right to present witnesses on his own behalf [I.C. 35-50-2-9(c)]; the sentencer's discretion is limited to an imposition of (or recommendation for) death or imposition of a definite period of time on murder (or recommend against the death penalty); the judge must enter written findings of fact demonstrating its reasons for imposition of sentence, Judy v. State, 416 N.E.2d 95, 107 (Ind. 1981); and the defendant is entitled to notice of the aggravating circumstances the State claims support its death request [I.C. 35-50-2-9(a)].

[12] Schiro's case is not controlled by Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). The dispositive events in Schiro's case (the acquittals) occurred at the ***guilt phase*** of trial when the jury found Schiro lacked the intent to kill. Simply put, Poland claimed that events at his ***sentencing hearing*** and on appeal prohibited reimposition of the death sentence; Schiro's claims revolve around acquittals at the guilt phase that were dispositive as to penalty. Thus, Schiro's double jeopardy violation stems from guilt phase verdicts which prohibited his case from ***proceeding*** to any sentencer on the question of death. The jury at the guilt phase found that the State did not prove its case; it's decision in that regard is final and immutable.

purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 59 L.Ed.2d 552 (1979).

In Ashe, supra, this Court stated:

> [Collateral estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit.

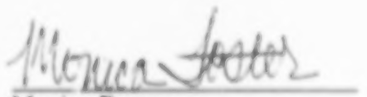
Id. at 443, 90 S.Ct. at 1194.

There can be no doubt the doctrine of collateral estoppel bars the imposition of the death penalty in this case since the jury acquitted Schiro of the "knowing murder" (Count I) at the guilt phase. Obviously, the parties are the same for both the guilt and penalty trials. The State's evidence at the penalty trial before the jury and the judge consisted solely of "incorporating therein by reference" all of the evidence presented at the guilt phase. Tr.R. 129. The State's final argument before the jury consisted solely of references from the guilt phase of trial. Through use of the guilt phase evidence it had presented on Schiro's claimed intent to kill (evidence on Count I), the State urged each sentencer to sentence Schiro to death. Collateral estoppel bars the State from forcing Schiro to run the gauntlet a second and third time.

VI. CONCLUSION

For all of the above argued reasons Schiro respectfully requests this Court to grant the writ and establish a time table for briefing and oral argument and for any and all other relief to which he may be entitled.

Respectfully submitted,



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10. Criminal Law ⇐641.13(7)

Defense counsel is not required to present mitigating evidence where none exists. West's A.I.C. 35-50-2-9.

11. Criminal Law ⇐641.13(7)

Trial counsel was not ineffective for failing to present allegedly mitigating evidence concerning defendant's drug and alcohol use in light of finding that capital murder defendant acted deliberately and had capacity to appreciate wrongfulness of conduct. West's A.I.C. 35-50-2-9; U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(2)

Failure to submit verdict forms to jury was not ineffective assistance of counsel since jury was accurately instructed on possible verdicts. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐1163(2)

Prejudice, needed to prevail on claim of ineffective assistance of trial counsel, would not be presumed based on counsel's failure to request that jury be sequestered where trial court repeatedly admonished jury not to talk about case with others. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐412.2(2)

Procedural safeguards of *Miranda* apply only to custodial interrogations. U.S.C.A. Const.Amend. 5.

15. Criminal Law ⇐1158(1)

Question of whether custodial interrogation occurred, as needed to invoke defendant's *Miranda* rights, is mixed question of law and fact which should be reviewed under clearly erroneous standard. U.S.C.A. Const.Amends. 5, 6.

16. Criminal Law ⇐519(3)

When reviewing whether defendant was "in custody" at time of confession, Court of Appeals examines the totality of circumstances, especially degree of restraint on defendant's freedom. U.S.C.A. Const.Amend. 5.

17. Criminal Law ⇐517.2(3), 519(1)

Murder defendant was not "in custody" at time of confession to executive director of half-way house where defendant voluntarily approached director and asked to speak with director and defendant was free to leave director's office at any time, even if half-way house was penal facility which confined residents; thus, director was not required to advise defendant of his *Miranda* rights. U.S.C.A. Const.Amend. 5.

18. Criminal Law ⇐412.1(2, 4)

Unlike statements made during custodial interrogation without prior *Miranda* warnings, statements made during noncustodial interrogation without *Miranda* warnings do not enjoy any presumption of coercion. U.S.C.A. Const.Amend. 5.

19. Homicide ⇐358(2)

Factual determination that murder defendant engaged in deceptive behavior at trial by constantly rocking back and forth in jury's presence, used to explain why jury recommended nondeath penalty sentence, was not clear error. 28 U.S.C.A. § 2254(d).

20. Criminal Law ⇐1163(2)

Juror's inadvertent observation of defendant in shackles and manacles outside courtroom is presumptively nonprejudicial unless defendant can affirmatively show that juror was prejudiced by such encounter.

21. Criminal Law ⇐1166.11(3)

Allegations that juror inadvertently observed defendant in shackles was not prejudicial, as needed to prevail on claims for ineffective assistance of counsel and due process violations, since contact between juror and defendant occurred outside courtroom, and was fleeting and inadvertent. U.S.C.A. Const.Amends. 6, 14.

Richard D. Gilroy, Alex R. Voils, Jr., Indianapolis, Ind., for petitioner-appellant.

David A. Arthur, Deputy Atty. Gen., Office of Atty. Gen., Federal Litigation, Indianapolis, Ind., for respondents-appellees.

Before CUMMINGS, WOOD, Jr.,* and EASTERBROOK, Circuit Judges.

* Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.

CUMMINGS, Circuit Judge.

A broken iron, a shattered vodka bottle, pictures of the lifeless naked body of Laura Luebbehusen covered with blood and bruises, a warning note left for a friend—these trial exhibits relate the nightmarish facts of the case before us.

An Indiana jury convicted Thomas Schiro of the rape and murder of 28-year-old Evansville, Indiana resident, Laura Jane Luebbehusen. For the crime the trial judge sentenced Schiro to death despite the jury's recommendation that Schiro receive a sentence of life imprisonment. Schiro challenged the trial court's imposition of the death penalty in the Indiana Supreme Court, once on direct appeal and two additional times on collateral review. The Indiana Supreme Court affirmed Schiro's conviction and sentence in each case, and the Supreme Court of the United States denied Schiro's petition for writ of certiorari from each of the three Indiana Supreme Court judgments. Schiro sought post-conviction relief from the federal district court for the Northern District of Indiana pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254. In a decision on the merits, Chief District Court Judge Allen Sharp denied Schiro's petition for habeas corpus relief and issued a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253 and Rule 22(b), Federal Rules of Appellate Procedure. On appeal this Court's jurisdiction stems from 28 U.S.C. § 1291.

Because this case involves the death penalty, and because of the views of three Supreme Court Justices (Brennan, Marshall, and Stevens), we have exercised the meticulous care that such review requires, see *Schiro v. Indiana*, 493 U.S. 910, 913 n. 9, 110 S.Ct. 268-270 n. 9, 107 L.Ed.2d 218 (1989) (Stevens, J., respecting denial of certiorari), and have examined the record in its entirety. After thorough review, and for the reasons set forth below, we affirm the judgment of the district court.

I.

A. Facts

The evidence adduced at trial viewed in the light most favorable to the state's case against the defendant reveals the following facts.[1] On February 4, 1981, Thomas Schiro was serving a three-year suspended sentence for robbery, a class C felony, at the Second Chance Halfway House in Evansville, Indiana. R. 113 (pre-sentence investigation report); R. 889-891 (testimony of Kenneth Hood).[2] That facility houses criminals sent for counseling and treatment rather than incarceration. *Id.* at R. 888-889. While in the work release program, Schiro worked across the street from Laura Luebbehusen's home. R. 1067-1069 (testimony of Robert Wheeler); R. 204-205 (testimony of Kenneth Hood).

At approximately 7:00 p.m. on February 4, Schiro went to an Alcoholics Anonymous meeting. R. 1435 (testimony of Mary Lee). Instead of staying for his 8:00 p.m. meeting, Schiro went to a liquor store and stole an alcoholic beverage. *Id.* at R. 1435, 1437. He took the liquor with him and went to see "quarter movies," which were characterized as hard core pornography. *Id.* at R. 1435, 1437-1439; R. 1743 (testimony of Dr. Frank Osanka). A woman who worked as a cashier at the quarter movie porn shop threw Schiro out when Schiro exposed himself to her. *Id.* at R. 1743. From there Schiro went directly to Ms. Luebbehusen's apartment. R. 1439 (testimony of Mary Lee). The time then was approximately 9:30 p.m. *Id.*

Schiro knocked on Ms. Luebbehusen's door and asked if he could use her phone on the pretext that his car would not start. R. 905-906 (testimony of Kenneth Hood). Ms. Luebbehusen, of course, lost her voice and her ability to tell her story when she lost her life.

1. This Court interprets the facts in the light most favorable to the state's case against the defendant. However, our presentation of the facts, like that of the Indiana Supreme Court, must necessarily rely upon the defendant's account of the events as related to persons who subsequently testified at trial. Ms. Luebbehusen, of course, lost her voice and her ability to tell her story when she lost her life.

2. Unless otherwise specified, all record citations refer to the proceedings before the Honorable Samuel Rosen, who presided at defendant's trial.

Auburn v. Connor, 109 S.Ct. at 1872, we look to the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." More specifically, "deadly force may be used if necessary to prevent escape, ... if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, ... and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985). On the other hand, deadly force is inappropriate when "the suspect poses no immediate threat to the officer and no threat to others." *Id.* Voida justifiably believed that Tom posed an immediate threat to her, and she gave him more than adequate warning. Tom had already inflicted serious physical harm on Voida in two separate encounters. He was rushing at her again. Voida could not have subdued Tom through lesser means, as she did not have her nightstick with her and she feared that reaching for her chemical repellant would expose her weapon to Tom's grasp. Voida fired one shot at Tom which did not hit him, but he insisted on lunging at her again. Voida was justified in concluding that Tom could not be subdued except through gunfire.[11] *Klein v. Ryan*, 847 F.2d 368 (7th Cir.1988) (officers reasonably used deadly force against unarmed and non-threatening forcible burglary suspect to prevent flight).

Finally, because Voida did not violate Tom's constitutional rights, there is no basis for liability against the other defendants either. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.").

Conclusion

In sum, none of Voida's actions prior to her physical contact with Tom is subject to any scrutiny under the Fourth Amendment. Further, Voida was justified in attempting to handcuff Tom because she then had a reasonable suspicion that he was engaged in criminal activity. In addition, Tom's continued flight from her, even after she had ordered him to stop, had given her probable cause to arrest him. Voida was justified in following him after the initial physical encounter because by this time he had committed at least two crimes. And she was ultimately justified in using deadly force because Tom had already inflicted serious bodily injury on her and threatened to continue doing so. Accordingly, we AFFIRM the district court's grant of summary judgment to the defendants.

Thomas SCHIRO, Petitioner-Appellant,

v.

Richard CLARK, Superintendent, and Indiana Attorney General, Respondents-Appellees.

No. 91-1509.

United States Court of Appeals, Seventh Circuit.

Argued Oct. 15, 1991

Decided May 8, 1992

Defendant's murder conviction and death sentence were affirmed on appeal by the Indiana Supreme Court, 451 N.E.2d 1047. Defendant petitioned for writ of habeas corpus. The United States District Court for the Northern District of Indiana, Allen Sharp, Chief Judge, 754 F.Supp. 646, denied petition and issued certificate of probable cause to appeal. The Court of Appeals, Cummings, Circuit Judge, assumed jurisdiction and held that: (1) Indiana death penalty statute which required trial judge to impose sentence after recommendation by jury was not unconstitutional; (2) imposing death penalty did not violate double jeopardy prohibitions; (3) trial counsel was not shown to have been ineffective; (4) confession to executive director of half-way house without *Miranda* warnings was admissible; and (5) no prejudice resulted from inadvertent out-of-court contact between juror and defendant while he was in manacles and shackles.

Affirmed.

1. Criminal Law ⇐749

Under Indiana law concerning death penalty, trial judge determines defendant's sentence after jury issues its sentencing recommendation. West's A.I.C. 35-50-2-9.

2. Criminal Law ⇐1206.1(2)

Criteria for determining whether state has appropriately limited discretion in imposing death penalty are whether statutory scheme furnishes clear and objective standards, specific and detailed guidance, opportunity for a rational review of process for imposing death sentence, and whether sentencing scheme narrows class of persons eligible for death penalty.

3. Criminal Law ⇐1206.1(2)

Indiana death penalty statute was not arbitrary or discriminatory, even though statute required judicial sentencing after advisory recommendation from jury, where statute's list of aggravating and mitigating factors provided fixed, objective, and uniform discretionary constraints, and judge was required to make written findings regarding existence of aggravating circumstances and that aggravating factors outweighed mitigating factors. West's A.I.C. 35-50-2-9; I.C. 35-4.1-4-3 (1982 Ed.).

4. Criminal Law ⇐1206.1(2)

Indiana death penalty statute, which permitted trial judge to impose death penalty despite jury recommendation to contrary, was not unconstitutional. West's A.I.C. 35-42-1-1(2); U.S.C.A. Const. Amends. 4, 5, 8; West's A.I.C. Const. Art. 1, §§ 12, 14, 16.

5. Federal Courts ⇐404

In order to assess effect of jury's findings in capital murder case, Court of Appeals looks to state law.

6. Double Jeopardy ⇐29, 103

Under Indiana law, jury's finding of felony-murder did not amount to acquittal on intentional murder charge and, thus, double jeopardy did not prohibit imposition of death penalty. U.S.C.A. Const.Amends. 5, 14; West's A.I.C. 35-50-2-9.

7. Double Jeopardy ⇐29

Imposing death penalty after contrary sentencing recommendation by jury did not violate the double jeopardy prohibition since no sentence could be entered under Indiana law except by trial judge; jury's sentencing recommendation was not final judgment and could not act as acquittal. U.S.C.A. Const.Amends. 5, 14; West's A.I.C. 35-50-2-9.

8. Criminal Law ⇐641.13(1)

In order to prove that defendant received ineffective assistance of counsel, defendant must show that counsel's performance fell below objective standard of reasonableness and that but for counsel's unreasonable conduct, result of proceeding would have been different. U.S.C.A. Const.Amend. 6.

9. Homicide ⇐357(4)

Claim that murder defendant was sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong did not constitute mitigating circumstance under Indiana death penalty law; "mental disease" or "defect" under statute did not include abnormality manifested only by repeated criminal or otherwise antisocial conduct. West's A.I.C. 35-50-2-9.

11. Despite these facts, the plaintiff argues that Tom had not committed any crime at all, and that Tom posed no threat of serious bodily injury because Voida initiated the contacts while he was running away. Appellant's Br. at 29. Here again the plaintiff focuses on the wrong time period. When Voida made the decision to use deadly force, Tom was not fleeing. He was actively and violently resisting arrest.

relief), that the trial court erred in finding that certain allegations were *res judicata* or waived, that the jury's guilty verdict for murder while committing a rape established that the defendant lacked the requisite mental state required for imposition of the death penalty, and that these alleged errors, taken together, constituted prejudice warranting reversal. *Schiro v. State*, 533 N.E.2d 1201 (1989) ("*Schiro III*"), certiorari denied, *Schiro v. Indiana*, 493 U.S. 910, 110 S.Ct. 268, 107 L.Ed.2d 218.

The case was then fully and independently reviewed on habeas corpus by Chief Judge Sharp of the Northern District of Indiana, who issued a final judgment denying habeas relief, 754 F.Supp. 646 (N.D.Ind. 1990), and also issued a certificate of probable cause to appeal. This Court has assumed jurisdiction under 28 U.S.C. § 1291.

II.

A. Judicial Imposition of the Death Penalty

[1] Under Indiana law, a trial judge determines a defendant's sentence after the jury issues its sentencing recommendation. Indiana Code § 35-50-2-9 (Burns 1979) states that "[t]he court shall make the final determination of the sentence, after considering the jury's recommendation." The Indiana Code further states that "[t]he court is not bound by the jury's recommendation." On appeal in this Court, Schiro argues that the Indiana Death Penalty statute violates constitutional guarantees provided by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The constitutional challenge raised by petitioner would indeed be a significant one if the Supreme Court had not largely resolved the matter in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). In *Spaziano*, the Court held that a judge may impose the death penalty despite a jury's recommendation to the contrary, since defendants have no constitutional right to jury sentencing in capital cases. Subsequent Supreme Court decisions have confirmed that holding. "The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Clemons v. Mississippi*, 494 U.S. 738, 745-746, 110 S.Ct. 1441, 1446-1447, 108 L.Ed.2d 725 (1990) (quoting *Cabana v. Bullock*, 474 U.S. 376, 385, 106 S.Ct. 689, 696, 88 L.Ed.2d 704 (1986)). Schiro concedes that the constitution does not require jury sentencing in capital cases. He also concedes that under *Spaziano* a judge may impose the death penalty despite a jury's recommendation to the contrary. However, he attempts to distinguish *Spaziano* on the basis that the "*Tedder* standard"[6] was employed in *Spaziano* but not in his case. According to Schiro, the *Tedder* standard is constitutionally necessary under *Spaziano*. Thus he contends that the Indiana Supreme Court's failure to adopt and employ the *Tedder* standard in his case renders his sentence unconstitutional.

This Court is not persuaded that *Spaziano* requires or that reasoning commends such a holding. Under *Spaziano*, a reviewing court's responsibility "is not to second-guess the deference accorded to the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." *Id.*, 468 U.S. at 465, 104 S.Ct. at 3165. See also *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Review designed to invalidate arbitrary or discriminatory sentences not only provides a more direct link to values of fairness and consistency, but also provides a more judicially manageable standard than reviewing the level of judicial deference accorded to the jury. Short of mind-reading or the submission of evidence regarding a sentencing judge's thought processes, this Court knows of no way to distinguish a case in which a trial judge gave serious consideration to the jury's sentencing recommendation before rejecting it, from a case in which the trial judge did not give serious consideration to the jury's recommendation before rejecting it. In short we cannot discern a practicable standard for reviewing the amount of deference the trial judge accorded to the jury's recommendation.

[2, 3] This Court, of course, seeks to ensure that the application of the death penalty statute is neither arbitrary nor discriminatory. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), sets forth three criteria to determine whether a state has appropriately limited a sentencer's discretion. The statutory scheme must furnish clear and objective standards, specific and detailed guidance, and an opportunity for rational review of the process for imposing the death sentence. *Id.* at 427, 100 S.Ct. at 1764 (Stewart, J., plurality opinion); *Stringer v. Black*, — U.S. —, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (explicitly applying the *Godfrey* principle to a "weighing" state). Furthermore, a sentencing scheme must narrow the class of persons eligible for the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Indiana's list of aggravating and mitigating factors provides fixed, objective and uniform discretionary constraints to guide death penalty sentencing decisions. Although Indiana vests sentencing authority in a judge rather than a jury, the judge's discretion is limited by the same factors which limit the jury's sentencing discretion. Before a judge can impose the death sentence she must find the existence of one of nine aggravating circumstances beyond a reasonable doubt. Ind.Code § 35-50-2-9 (Burns 1979). In addition, the trial judge must find that any aggravating factors outweigh any mitigating factors. *Id.* Not only has Indiana enumerated clear, objective and specific standards for imposing the death penalty, but it has also required the sentencing judge to make written findings with respect to those factors in order to facilitate appellate review. Ind.Code § 35-4.1-4-3 (Burns 1979). As a result of these safeguards, the Indiana death penalty statute will not lead to arbitrary or discriminatory results generally or in Schiro's case. There is no one set way for a state to set up its capital sentencing scheme. *Spaziano*, 468 U.S. at 464, 104 S.Ct. at 3164. In light of studies that jury sentencing leads to racial discrepancies in capital sentencing, *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), a state might rationally conclude that judicial sentencing could prove to be a more desirable alternative. Regardless of its rationale, a state may constitutionally establish pure judicial sentencing in capital cases or it may permit judicial sentencing upon a non-binding, advisory recommendation from a jury, as Indiana has chosen to do.

[4] Schiro does not contend that imposition of the death sentence in his case was either arbitrary or discriminatory. His crime was not only heinous but deliberate and calculated. As Judge Rosen noted in his pronouncement of sentence, this crime involved cruel and sadistic acts; yet Schiro wore gloves while committing those acts so as not to leave fingerprints. He makes no claim that he is innocent of the crimes charged, nor could he in light of the overwhelming testimony and physical evidence. In addition, extensive evidence revealed that he committed numerous other brutal and sadistic acts which cast doubt on his character and his ability to be rehabilitated.

Some may contend that "a judge should not have the awesome power to reject a jury recommendation of life." *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (Marshall, J., dissenting from denial of certiorari). But under the Supreme Court's jurisprudence, which is binding on this Court, a state may elect to give its trial judges such power. While a judge's power may exceed constitutional boundaries if her judgments are arbitrary or discriminatory, what constitutes arbitrary or discriminatory sentencing need not be defined in relation to a standard of judicial deference to the jury. Because the Supreme Court established only that *Tedder* was a "significant safeguard," *Spaziano*, 468 U.S. at 465, 104 S.Ct. at 3165, not that it was an essential one, we reject

6. Under the "*Tedder* standard," *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), a trial judge may sentence a defendant to death despite a jury recommendation to the contrary if the evidence favoring the death penalty is "so clear and convincing that no reasonable person could differ." Although the Indiana Supreme Court had not adopted the *Tedder* standard at the time of Schiro's case, that court subsequently adopted it in *Chavez v. State*, 534 N.E.2d 731 (1989).

R. 1435 (testimony of Mary Lee). After he pretended to use the phone, Schiro asked to use the bathroom. R. 1425-1426 (testimony of Mary Lee). When he came out of the bathroom Schiro was exposed and Luebbehusen became frightened. *Id.* at R. 1426. In an attempt to calm her, Schiro told Luebbehusen that he did not want to hurt her, that he was gay, and that he was just trying to win a bet that he could "get it on" with a woman. *Id.* Schiro went through the small apartment looking for drugs and money. *Id.* at R. 1746. He came back with drugs and two dildos. *Id.* Schiro told Luebbehusen to drink some liquor and take drugs as he did. *Id.* at R. 1745-1746, 1748. Schiro also told Luebbehusen to insert a dildo into his anus but he found that very painful. *Id.* at R. 1746-1747. Luebbehusen told Schiro that she was gay, that she had been raped as a child, that she had never had sex before, and that she did not want to have sex. *Id.* at R. 1745, 1747. Schiro then raped her. *Id.*[3] When Schiro left the room, Luebbehusen tried to leave but Schiro pulled her back in the house, dragged her by her hair, told her not to try to leave again and raped her a second time. *Id.* at R. 1749. When the liquor ran out, Schiro took her with him to get some more. R. 1441 (testimony of Mary Lee). When they returned to Luebbehusen's home Schiro raped her a third time and then passed out on the couch. R. 1428 (testimony of Mary Lee), R. 1738, 1751 (testimony of Dr. Frank Osanka). When Schiro woke up, Luebbehusen was dressed and headed out the door. R. 1428 (testimony of Mary Lee). Luebbehusen told Schiro that she would not turn him in and was just going to find her girlfriend. *Id.* at R. 1430. Schiro wouldn't let her leave and Schiro believed that she then fell asleep. R. 1750 (testimony of Dr. Frank Osanka). At that time Schiro decided that he had to kill her so that she couldn't report the rapes. R. 1428-1429 (testimony of Mary Lee). Schiro hit her on the head with a vodka bottle until it shattered. *Id.* at R. 1428, 1429, 1430. Luebbehusen was fighting Schiro. *Id.* He picked up an iron and beat her with it; she was fighting him. She was still fighting him when he strangled her to death. *Id.*, R. 647-648 (testimony of Dr. Albert Venables). He then dragged her body from the bedroom to the living room where he performed vaginal and anal intercourse on the corpse and chewed on several parts of her body. R. 44 (psychiatric evaluation By Dr. Bernard Woods), R. 1429 (testimony of Mary Lee), R. 1736, 1751 (testimony of Dr. Frank Osanka).

When Schiro left Luebbehusen's house he took one of the plastic dildos with him and threw it in the trash behind a tavern in Vincennes. R. 1431 (testimony of Mary Lee). Schiro also took gloves that he had been wearing so as not to leave any fingerprints. *Id.* at R. 1432, 1433. He gave the gloves to his girlfriend Mary Lee who washed them, cut them in little pieces and threw them away.[4]

The following morning, February 5, 1981, Luebbehusen's roommate Darlene Hooper and her ex-husband Michael Hooper discovered Luebbehusen's body near the doorway. R. 439 (testimony of Michael Hooper). Luebbehusen's legs were spread apart and her slacks were pulled down around her ankles. *Id.* at R. 442. She had many bruises and cuts on her body, which included tooth marks, and a vaginal laceration. R. 653, 649, 657, 661-662 (testimony of Dr. Albert Venables). Blood covered the walls and floor, and parts of the house were in disarray. R. 442 (testimony of Michael Hooper), R. 543-547 (testimony of Dennis Buckel). Michael Hooper called the police, who recovered a shattered vodka bottle and a broken iron in addition to other evidence. R. 439 (testimony of Michael Hooper), R. 479, 480, 552-564 (testimony of Dennis Buckel).

3. We regret the Indiana Supreme Court's statement that according to Mary Lee, Schiro "told Luebbehusen he would make love to her." As far as we can tell, Mary Lee's testimony never used or suggested the term "made love," with its consensual connotations. Lee said that Schiro said "he did it to [Luebbehusen]," and that he raped her. R. 1426, 1427.

4. Lee later turned the pieces over to detectives. R. 1433 (testimony of Mary Lee), R. 808 (testimony of Donald Erk).

A few days later, Luebbehusen's automobile was discovered approximately one block away from the Second Chance Halfway House. R. 939-940 (testimony of Keith Shiver).[5]

B. Procedural History

Because the judicial system has considered Schiro's case for over ten years, this section briefly addresses the major procedural history of Schiro's case. On September 12, 1981, in the Brown Circuit Court, in Nashville, Indiana, petitioner Thomas Nicholas Schiro was convicted of murder while committing or attempting to commit rape, Ind.Code § 35-42-1-1(2) (Burns 1979). On October 2, 1981, Judge Samuel R. Rosen pronounced a sentence of death despite a jury recommendation to the contrary. Because Judge Rosen imposed the death penalty, the case was automatically appealed to the Indiana Supreme Court. While the case was pending on direct review, the Indiana Supreme Court granted the state's petition to remand the case to Judge Rosen to make written findings of fact regarding aggravating and mitigating circumstances. Judge Rosen affirmed that at sentencing the state had proved the existence of one aggravating circumstance beyond a reasonable doubt—that "the defendant committed the murder by intentionally killing the victim while committing or attempting to commit * * * rape." Trial Court's Nunc Pro Tunc Pronouncement of Sentencing of February 23, 1983. Judge Rosen found no mitigating factors. *Id.* On direct appeal to the Indiana Supreme Court, Schiro raised numerous issues. He claimed that the Indiana death penalty statute violated the Indiana and United States Constitutions, the trial court erred in imposing the death penalty, the warrant for the search of his room was improperly issued, his confessions were unlawfully admitted into evidence, a letter he wrote regarding his prior criminal acts was improperly excluded from evidence, the jury was not supplied with proper verdict forms, and the presentence report contained improper information. The Indiana Supreme Court rejected each of Schiro's arguments, upheld his conviction and sentence, and remanded the case to the trial court for determination of the date of execution of the death sentence. *Schiro v. State*, 451 N.E.2d 1047 (1983) ("*Schiro I*"). At that time, Schiro sought review of his death penalty conviction in the Supreme Court of the United States but it denied his petition for writ of certiorari. *Schiro v. Indiana*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699.

Schiro petitioned for post-conviction relief in the Brown Circuit Court on May 11, 1984. His petition was heard by the Honorable James M. Dixon acting as a special judge. After a hearing, Judge Dixon denied the petition. The Indiana Supreme Court reviewed Schiro's post-conviction claims that the trial judge who sentenced him was biased and improperly considered evidence of Schiro's behavior at trial, and that he was denied effective assistance of counsel. Again, the Indiana Supreme Court affirmed the judgment of the trial court. *Schiro v. State*, 479 N.E.2d 556 (1985) ("*Schiro II*"), and the Supreme Court of the United States again denied Schiro's petition for writ of certiorari to vacate the death sentence. *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986).

Schiro filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana. Chief Judge Allen Sharp remanded the case to the Indiana courts in order for Schiro to exhaust all available state remedies. He then filed a second petition for post-conviction relief in the Indiana Circuit Court, which petition was reviewed and denied by Special Judge John Baker of Bloomington, Indiana. The Indiana Supreme Court reviewed Schiro's case for the third time and again affirmed. It rejected Schiro's contentions that he was denied effective assistance of counsel at trial (on direct appeal and on his first petition for post-conviction

5. A police search of the defendant's room uncovered additional physical evidence of the crime. R. 735-747 (testimony of Donald Erk).

A-4

A-3

Schiro's assertion that the sentencing scheme applied in his case can be meaningfully distinguished from that at issue in *Spaziano*.

B. Double Jeopardy

Schiro also contends that imposition of the death penalty in his case violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). That Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The prohibition against Double Jeopardy only applies "if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984). Thus Schiro's argument hinges on his claim that he was acquitted of intentional murder. Specifically, Schiro claims that either the jury's conviction for murder while committing or attempting to commit a rape constituted an acquittal on the murder charge, or that the jury's sentencing recommendation acted as an acquittal. Each of these assertions will be addressed in turn.

[5, 6] At trial, the jury was offered potential verdicts of murder, murder while committing or attempting to commit rape, and murder while committing or attempting to commit deviate sexual conduct. R. 108. The jury found Schiro guilty of felony-murder, murder during the course of a rape, and left blank spaces beside the other two counts on the jury form. R. 108. The felony-murder charge does not require the prosecution to prove that Schiro killed Luebbehusen intentionally. Schiro argues that the jury's conviction for felony-murder acted as an acquittal on the intentional murder charge and that the jury necessarily found that Schiro did not murder Luebbehusen intentionally. In order to assess the effect of the jury's findings, this Court looks to state law. *United States ex rel. Young v. Lane*, 768 F.2d 834, 841 (7th Cir.1985) ("states possess substantial latitude to decide *which* decisions in the criminal process are to be treated as 'acquittals' "), certiorari denied, *Young v. Lane*, 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300. The Indiana Supreme Court squarely rejected Schiro's argument that he was acquitted of intentional murder. *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989). That Court stated that "[felony murder] is not an included offense of [murder] and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider." *Id.* Since the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen. Therefore this double jeopardy argument must fail.[7]

[7] Next, we address Schiro's contention that the jury's sentencing recommendation constituted a final judgment of acquittal. Schiro cites *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), to support his proposition that the Indiana jury's advisory sentencing recommendation operated as an acquittal. Once again, the Supreme Court's holding in *Spaziano* invalidates Schiro's claim. According to *Spaziano*, *Bullington* does not apply to cases in which a judge imposes the death penalty against the jury's advisory recommendation. *Spaziano*, 468 U.S. at 453, 104 S.Ct. at 3158.

7. The collateral estoppel argument raised, not by Schiro, but by Justice Stevens' opinion respecting denial of certiorari in this case, does not change our understanding. 493 U.S. 910, 110 S.Ct. 268, 270, 107 L.Ed.2d 218. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), bars relitigation where an issue of ultimate fact has been previously determined by a valid and final judgment. However, the defendant must show that the jury's verdict actually and necessarily determined the issue he seeks to foreclose. *United States v. Patterson*, 827 F.2d 184 (7th Cir.1987) (per curiam). Here Schiro's conviction for murder/rape did not act as an acquittal with respect to the pure murder charge as a matter of state law. Thus the jury's verdict did not determine the issue of intentionality.

Unlike the binding sentencing recommendations issued by Missouri juries at the time of *Bullington*, Indiana law leaves no doubt that its juries' sentencing recommendations are only recommendations. The assumption that "the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence" is no longer tenable in light of *Spaziano*. *Cabana v. Bullock*, 474 U.S. 376, 388 n. 4, 106 S.Ct. 689, 697, n. 4, overruled on different grounds, *Pope v. Illinois*, 481 U.S. 497, 504 n. 7, 107 S.Ct. 1918, n. 7, 95 L.Ed.2d 439 (1987). Schiro had no legitimate expectation that the jury's recommendation would be his final sentence. Cf. *United States v. Di Francesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) (holding that modification of a sentence is not violative of the Double Jeopardy Clause when a defendant has no legitimate expectation of finality in the original sentence). No final conviction could be entered until the sentence was entered. And under Indiana law, no sentence could be entered, except by the trial judge—the only person given authority to determine the defendant's sentence. Because the jury's sentencing recommendation was not a final judgment, it could not act as an acquittal. Judge Rosen declared that the state had proved the existence of an aggravating factor beyond a reasonable doubt[8] and the jury never acquitted Schiro on the element of intentionality. Thus we reject Schiro's double jeopardy claim.

C. Ineffective Assistance of Counsel

[8] Schiro also contends that he was denied effective assistance of counsel. He bases his contention on four alleged failures of trial counsel, namely, (1) counsel failed to present evidence of mitigating circumstances, (2) counsel failed to adequately prepare or investigate the case, (3) counsel failed to submit guilty but mentally ill verdict forms to the jury and (4) counsel failed to request that the jury be sequestered or adequately admonished. In order to prove that he received ineffective assistance of counsel, Schiro must show both that counsel's performance fell below an objective standard of reasonableness and that but for counsel's unreasonable conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 700, 104 S.Ct. 2052, 2071, 80 L.Ed.2d 674 (1984), rehearing denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864; *United States v. Lane*, 819 F.2d 798, 802 (7th Cir.1987). Although this standard applies to counsel's conduct as a whole, for clarity this Court will examine Schiro's first and primary contention separately.

D. Mitigating Circumstances

Schiro alleges that the trial judge's finding of no mitigating circumstances was due to his trial counsel's failure to present any evidence of mitigating circumstances to the court. As an initial matter, this Court notes that this assertion is patently incorrect. His counsel did attempt to prove the existence of a mitigating factor, he strenuously argued that Schiro's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication"—one of the seven mitigating factors provided by Indiana's death penalty statute. Indiana Code § 35-50-2-9.

[9] Judge Rosen's denial of the existence of any mitigating factors was not because Schiro's counsel did not raise any argument for mitigation, but because the judge found that such arguments did not justify mitigation. At trial, Schiro argued that he was a sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong. In support of this assertion, his expert witness, Edward Don-

8. The Indiana Supreme Court held that "[t]he [trial] court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt." *Schiro v. State*, 479 N.E.2d 556. Whether the trial court appropriately determined the existence of an aggravating factor under Indiana law is a question of state law which Schiro has not asked this Court to review and which is not within the ambit of habeas review.

nerstein, testified that after a short exposure to aggressive pornography "non-rapist populations * * * begin to endorse myths about rape." R. 1549 (testimony of Edward Donnerstein). "They begin to say that women enjoy being raped and they begin to say that using force in sexual encounters is okay. Sixty percent of the subjects will also indicate that if not caught they would commit the rape themselves." *Id.* In addition to Mr. Donnerstein's testimony that pornography generally encourages men to commit acts of violence against women, one of defendant's other expert witnesses testified that Schiro's viewing of pornography actually encouraged him to commit the acts of violence at issue in this case. Dr. Frank Osanka testified that Schiro viewed pornographic films from age six, and throughout his childhood and his adulthood, that led him to be aroused by women's pain and taught him techniques of rape. R. 1713, 1727 (testimony of Dr. Frank Osanka, listing at least two specific films which encouraged Schiro's criminal activity). A written autobiographical statement of petitioner's which was read to the jury is perhaps most telling: "I can remember when I get horny from looking at girly books and watching girly shows that I would want to go rape somebody. Every time I would jack off before I come I would be thinking of rape and the women I had raped and remembering how exciting it was. The pain on their faces. The thrill, the excitement." R. 1368–1369 (Schiro's autobiographical statement). At closing argument Schiro's counsel relied on Dr. Osanka and Mr. Donnerstein to support his claim that "the pattern is clear, premature exposure to pornography and continual use with more violent forms created one thing, created a person who no longer distinguishes between violence and rape, or violence and sex."

Schiro contended either that pornography is a mitigating factor akin to intoxication or mental disease or defect which rendered him unable to appreciate the criminality of his conduct, or that pornography caused him to suffer from sexual sadism, which in turn rendered him unable to appreciate the wrongfulness of his conduct. After hearing such evidence, Judge Rosen rejected the arguments on the basis that defendant was sadistic, not psychotic or insane, and on the basis that he was able to appreciate the wrongfulness of his conduct. Clearly, Indiana may determine that sadism (or voyeurism, exhibitionism, and necrophilia as also claimed) does not amount to a mental disease or defect which warrants reduced punishment. This is particularly so because the primary manifestation of these conditions is criminal, anti-social conduct and under Indiana law "[t]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." R. 405, *Richardson v. State*, 170 Ind.App. 212, 351 N.E.2d 904 (1976). Moreover, the trial judge could permissibly find from the evidence both that Schiro understood the criminality of his conduct and that pornography is not a mental disease or defect which would permit a finding of insanity.

The troubling aspect of Schiro's defense is that his argument that pornography reduced his capacity to understand the criminality of his conduct, if successful, would not only excuse him from imposition of the death penalty but further excuse him for his criminal conduct altogether on the basis that he was not guilty by reason of insanity. Under Schiro's theory pornography would constitute a legal excuse to violence against women. This Court previously addressed the issue of pornography in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (1985), affirmed, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986). There we accepted the premise of anti-pornography legislation that pornographic depictions of the subordination of women perpetuate the subordination of women and violence against women.[9] However, we held that under the First Amendment pornography may not be banned because its harmful effects depend on mental intermediation. 771 F.2d at 329. It would be impossible to hold both that pornography does not directly cause violence but

9. See Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, 195–214 (1989).

criminal actors do, and that criminal actors do not cause violence, pornography does. The result would be to tell Indiana that it can neither ban pornography nor hold criminally responsible persons who are encouraged to commit violent acts because of pornography! The recognition in *Hudnut* that pornography leads to violence against women does not require Indiana to establish a defense of insanity by pornography.[10] In *Hudnut* we said that pornographers may be liable for rape just as the instigator of a riot could be held liable for inciting that riot. 771 F.2d at 333. *Hudnut* does not suggest that the rioter or the rapist is not also culpable for his own conduct.

[10, 11] As for the other mitigating factors, defense counsel is not required to present mitigating evidence where none exists. Cf. *Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir.1988), certiorari denied, 494 U.S. 1047, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). If Schiro alleges prejudice from his trial counsel's failure to present mitigating evidence at trial, as he does here, he must offer some piece of mitigating evidence that should have been presented to the trial court but wasn't. He offers none, and we fail to see what evidence of mitigation might have been offered.[11] Schiro did present evidence relating to his drug and alcohol use, but the trial court found that evidence insignificant since Schiro acted deliberately and had the capacity to appreciate the wrongfulness of his conduct. As for his criminal history, Schiro's record is replete with violent crimes. R. 113. His own expert believed that Schiro had committed some nineteen to twenty-four rapes. R. 1721 (testimony of Dr. Frank Osanka). Schiro's girlfriend testified regarding Schiro's numerous brutal, sadistic and life-threatening assaults on herself and her son. R. 1181, 1446, 1461, 1463, 1465, 1467, 1472. Linda Summorford testified that Schiro broke into her home, held a gun to her son's head and raped her in front of her six-year-old daughter who has cerebral palsy. R. 1830–1841. The jury's verdict settled any question as to whether the victim consented to sexual intercourse, see *O'Connor v. State*, 529 N.E.2d 331 (Ind. 1988), and she certainly did not consent to be murdered. Schiro's participation was as a principal and that participation was far from minor. Moreover, Schiro did not act under the domination of another person. Because Schiro has not shown any evidence of mitigating factors that his trial counsel should have offered but unreasonably and prejudicially failed to offer, his ineffective assistance claim on this point is devoid of merit.

[12, 13] Schiro's other ineffective assistance claims are equally devoid of merit. He has not shown and the record does not reveal evidence that his trial counsel failed to prepare Schiro's case adequately. Counsel's failure to submit certain verdict forms to the jury was not prejudicial since the jury was accurately instructed on those possible verdicts. Finally, we do not presume prejudice where the defendant's counsel has failed to request that the jury be sequestered. *Bell v. Duckworth*, 861 F.2d 169, 170–171 (7th Cir.1988), certiorari denied, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). Moreover, in contrast to Schiro's assertion, Judge Rosen repeatedly admonished the jury not to talk about the case with others. R. 579, 702–703, 934–936, 1064–1065, 1169–1170, 1288–1290, 1497–1498, 1660, 1791–1793.

Petitioner has not shown that his counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by any such conduct. He has

10. Under repeated questioning by Judge Rosen as to the relevance of his testimony, Schiro's own witness conceded that even though the viewing of pornography is relevant to show whether Schiro sees rape as a violent crime, viewing pornography does not have "any relationship to competency or legal sanity." R.1560–1561 (testimony of Mr. Donnerstein). Indiana can decide, and appears to have decided in this case, that a defendant cannot excuse his conduct by showing that in spite of his awareness of a person's non-consent to sexual relations, he believed that he had a right of sexual access or dominion over that person.

11. Indiana Code § 35-50-2-9(c) (Burns 1979) sets forth mitigating circumstances appropriate for consideration.

him in manacles and shackles. As a result he claims to have been denied both effective assistance of counsel and due process of law. A juror's inadvertent observation of a defendant in shackles and manacles outside the courtroom is presumptively non-prejudicial unless the defendant can affirmatively show that jurors were prejudiced by such an encounter. *United States v. Jones*, 696 F.2d 479 (7th Cir.1982), certiorari denied, 462 U.S. 1106, 103 S.Ct. 2455, 77 L.Ed.2d 1333 (1983). The state has a legitimate interest in seeing that the defendant once outside the courtroom remains in custody and does not flee. *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

[21] The Indiana Supreme Court has distinguished between cases in which jurors see a prisoner in shackles while being transported to and from court, *Sweet v. State*, 486 N.E.2d 924, 929 (Ind.1986), and cases in which jurors see a shackled prisoner during court proceedings, *Walker v. State*, 274 Ind. 224, 410 N.E.2d 1190, 1193-1194 (1980). That court has held that reasonable jurors can expect a criminal defendant to be in manacles and shackles during breaks and while being transported. *Jenkins v. State*, 492 N.E.2d 666, 669 (Ind. 1986). Accordingly, the Indiana Supreme Court determined that Schiro's allegation did not demonstrate prejudice. *Schiro III*, 533 N.E.2d 1201. Where the contact between the jury and the defendant was both fleeting and inadvertent, we agree that Schiro has not met his burden of showing prejudice.

III.

This Court has considered each of Schiro's arguments and for the foregoing reasons his constitutional claims are rejected. The judgment of the district court is affirmed.

* Case No. 91-1908 was submitted and decided on the briefs.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ellis BURRELL, Billy J. Henry, Jon P. Hammonds, William D. Hatch, John Jones, and Steven E. Williams, Defendants-Appellants.

Nos. 91-1908,* 91-2089, 91-2090, 91-2091, 91-2113 and 91-2114.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 16, 1992.

Decided May 11, 1992.

Rehearing Denied June 10, 1992 in Nos. 91-2089 and 91-2091.

Defendants were convicted of various narcotics and firearm offenses by the United States District Court for the Central District of Illinois, Harold Albert Baker, Chief Judge, and they appealed. The Court of Appeals, Bauer, Chief Judge, held that: (1) allowing jurors to handle firearms used by defendants prior to closing arguments was not abuse of discretion; (2) finding that defendants were knowing participants in narcotics conspiracy, and not mere paid bodyguards, was sufficiently supported by evidence; and (3) defendants' base offense levels were properly calculated based on total amount of marijuana that coconspirators had agreed to purchase.

Affirmed.

1. Criminal Law ⇐663, 858(1)

District court has considerable discretion in handling of exhibits during trial, as well as during jury deliberations.

2. Criminal Law ⇐1153(1)

Court of Appeals reviews district court's handling of exhibits for clear abuse of discretion.

3. Criminal Law ⇐663

Allowing jury to handle firearms used by alleged narcotics conspirators prior to closing arguments was not abuse of discretion, as constituting an improper appeal to jurors' passion and prejudice, where all of the weapons had been admitted into evidence.

4. Criminal Law ⇐663

Allowing jurors to handle, in group, the firearms used by alleged narcotics conspirators did not improperly bolster government's case, on theory that jurors, when confronted with weapons as group, were all but forced to conclude that defendants were part of one conspiracy.

5. Conspiracy ⇐45

Conspirator's declarations may be evidence that defendant joined and participated in conspiracy.

6. Criminal Law ⇐629(1)

Trial court need not give proposed instruction if essential points are covered by instruction given.

7. Criminal Law ⇐808(1)

District court has substantial discretion with respect to specific wording of jury instructions.

8. Constitutional Law ⇐270(2)
Criminal Law ⇐1299, 1306

Defendant had no constitutionally protected right to downward departure from authorized sentence, based on substantial assistance that he allegedly provided to government, and could not complain of prosecutor's alleged bad faith in failing to move for reduction. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.App.

9. Criminal Law ⇐1306

Decision to move for reduction in authorized sentence based on defendant's substantial assistance to government is one committed to discretion of prosecutor, and is not reviewable for arbitrariness or bad faith. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.App.

10. Criminal Law ⇐274(3)

Defendant must be allowed to withdraw plea, where prosecutor promises to file motion for downward departure from authorized sentence and fails to honor that promise.

11. Criminal Law ⇐273.1(2), 274(3)

Plea agreement between government and alleged narcotics conspirator, whereby government agreed, in its sole discretion, to move for downward departure from authorized sentence if defendant provided substantial assistance, did not obligate prosecutor to move for departure, and did not permit defendant to withdraw guilty plea for prosecutor's alleged bad faith in failing to seek departure after he allegedly assisted government in obtaining conviction of coconspirator. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.App.

12. Criminal Law ⇐1158(4)

Factual findings made by trial court at suppression hearing will be upheld on appeal, absent clear error.

13. Arrest ⇐63.4(2)

"Probable cause" for arrest exists if, at moment arrest was made, facts and circumstances within officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant prudent person in believing that offense had been committed. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

14. Arrest ⇐63.4(2, 3)

"Probable cause" for arrest requires more than bare suspicion, but need not be based on evidence sufficient to support conviction, nor even on showing that officer's belief is more likely true than false. U.S.C.A. Const.Amend. 4.

15. Arrest ⇐63.4(1)

Constitutional validity of warrantless arrest depends upon probable cause to effectuate arrest under totality of circumstances. U.S.C.A. Const.Amend. 4.

16. Arrest ⇐63.4(2)

Relevant inquiry, in deciding whether police officers had "probable cause" to arrest, is not whether officers' specific conduct is innocent or guilty, but on level of

therefore failed to meet either of his burdens.

E. Admissibility of Confessions

Schiro admitted killing Luebbehusen to Kenneth Hood, Second Chance Halfway House Executive Director. At trial, Hood testified regarding the substance of Schiro's confession. R. 888-935. On appeal petitioner complains that his confession was obtained in violation of the Fifth, Fourth and Fourteenth Amendments to the Constitution because he was not notified of his *Miranda* warnings; he therefore argues that his confessions and the ensuing confessions to his girlfriend should have been suppressed at trial.

[14] The procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), only apply to custodial interrogations. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990); *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). In order to determine whether Schiro's confession to Hood was made during the course of a custodial interrogation, the Indiana Supreme Court examined the surrounding circumstances. According to that court, Schiro approached his work release counselor and asked to discuss something "heavy." The work release counselor thought that Schiro's problem concerned his alcoholism and referred him to Executive Director Ken Hood, to whom Schiro had spoken earlier that day. Hood felt that Schiro wanted to talk and asked him general questions regarding the reason for his seeking their conversation.

> "Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder [which Schiro had confessed to Hood]. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station."

451 N.E.2d at 1047, 1060-1061.

[15] On the basis of these facts, the Indiana Supreme Court held that Schiro was not subject to custodial interrogation at the time of his confession to Hood. The question of custodial interrogation is a mixed question of law and fact. This Court has recently noted that mixed questions of law and fact should be reviewed under a clearly erroneous standard. *United States v. Levy*, 955 F.2d 1098, 1103 n. 5 (7th Cir.1992); *Mars Steel Corp. v. Continental Bank*, 880 F.2d 928, 933-937 (7th Cir.1989) (en banc); *Mucha v. King*, 792 F.2d 602, 604-606 (7th Cir.1986); but see *United States v. Hocking*, 860 F.2d 769 (7th Cir.1988). We have suggested without deciding that a clearly erroneous standard of review is appropriate in habeas corpus cases as well as other types of cases. *Stewart v. Peters*, 958 F.2d 1379 (7th Cir. 1992); *Hanrahan v. Greer*, 896 F.2d 241, 244 (7th Cir.1990). That question need not be resolved here since the outcome of our decision would be the same under either *de novo* or clear error review.

[16] When reviewing whether a defendant was in custody at the time of a confession, this Court examines the totality of the circumstances, especially the degree of restraint on the suspect's freedom. *United States v. Hocking*, 860 F.2d 769, 772 (7th Cir.1988) (noting that the key determination is whether at the time of interrogation the defendant was subjected to a "restraint on [his] freedom of movement of the degree associated with formal arrest"). Schiro contends that he was in custody at the time of his confession to Hood because the Second Chance Halfway House is a penal facility which confines residents unless they have express authorization to leave.

Sureeporn Roll v. State, 478 N.E.2d 161, 163 (Ind.App.1985).

[17] This Court rejects Schiro's assertion that any statement made by a defendant while he is under some type of supervision *ipso facto* constitutes custodial interrogation. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 2397 (rejecting "the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent"). Cf. *Williams v. Chrans*, 945 F.2d 926, 950-954 (7th Cir.1991) (questioning by probation officer did not constitute custodial interrogation); *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (routine meeting between defendant and his parole officer not considered to be custodial interrogation).

[18] Schiro voluntarily approached Hood and asked to speak with him. Schiro was free to leave Hood's office at any time. The environment at the time of Schiro's confession to Hood bears slight resemblance, if any, to the type of coercive police conduct which the Fifth Amendment was designed to prevent. Cf. *Roberts v. United States*, 445 U.S. 552, 560-561, 100 S.Ct. 1358, 1364-1365, 63 L.Ed.2d 622 (1980) (no custodial interrogation where defendant initiated interview with investigators); *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630 ("volunteered statements are not barred by the Fifth Amendment"). Unlike statements made during custodial interrogation without prior *Miranda* warnings, statements made during a noncustodial interrogation without such *Miranda* warnings do not enjoy any presumption of coercion. *United States v. Fazio*, 914 F.2d 950, 956 (7th Cir.1990). Because Schiro's confession to Hood was not made during custodial interrogation, *Miranda* warnings were not required and Hood's testimony regarding Schiro's confession was properly admitted into evidence at trial. As Schiro's confession was properly entered into evidence, this Court need not address Schiro's further claim that testimony regarding his voluntary confession to his girlfriend was unconstitutional as a fruit of the confession to Hood. No impropriety is asserted with respect to his confession to a fellow prisoner.

F. Deceptive Behavior at Trial

[19] According to Judge Rosen, Schiro tried to deceive the jury into believing that he was mentally ill.[13] Judge Rosen stated:

> This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

Trial Court's Sentencing Judgment of October 2, 1981. On appeal, Schiro asserts violations of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because Judge Rosen allegedly based his decision to impose the death penalty on his outer chambers observation of Schiro.

The Indiana Supreme Court found that Judge Rosen did not consider Schiro's apparently deceptive behavior at trial as an aggravating factor which justified imposition of the death penalty. *Schiro v. State*, 479 N.E.2d 556 (1985). Rather, Judge Rosen's observation sought to explain why the jury recommended a sentence which was against the manifest weight of the evidence produced at trial. The Indiana Supreme Court's factual determination is binding on this Court absent clear error, 28 U.S.C. § 2254(d), which has not been shown.

G. Manacles and Shackles

[20] Schiro contends that as he exited an elevator in the courthouse and passed through a hallway there, the jury viewed

13. The trial judge was not the only one to observe that some of Schiro's mannerisms appeared to be "a caricature of someone mentally ill" R.44 (psychiatric evaluation by Dr. Bernard Woods).

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 8, 1992.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon FRANK H. EASTERBROOK, Circuit Judge

Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

THOMAS SCHIRO, Petitioner-Appellant,	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 91-1509 vs.	No. 83 C 588
RICHARD CLARK, Superintendent, and INDIANA ATTORNEY GENERAL, Respondents-Appellees.	Allen Sharp, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggesion for rehearing en banc filed by petitioner-appellant on August 21, 1992, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

[t]he courts have long recognized that Congress gave the NLRB [National Labor Relations Board] exclusive jurisdiction over unfair labor practices. Thus, the Supreme Court has stated that the NLRA "preempts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." *Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees [v. Lockridge]*, 403 U.S. 274, 276 [91 S.Ct. 1909, 1913, 29 L.Ed.2d 473] (1971) (explaining the labor law pre-emption doctrine established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 [79 S.Ct. 773, 3 L.Ed.2d 775] (1959)). *See also Veal v. Kerr-McGee Coal Corp.*, 682 F.Supp. 957, 959 (S.D.Ill.1988), *aff'd*, 885 F.2d 873 (7th Cir.1989) ("when an activity is either expressly or arguably protected by § 7 or prohibited by § 8 [of the NLRA], a claim arising out of that activity is preempted by the Act.")

McDonough v. Gencorp, Inc., 750 F.Supp. 368, 369–70 (S.D.Ill.1990).

Section 8 of the NLRA proscribes as an unfair labor practice coercion of an employee who is exercising his rights under the NLRA. 29 U.S.C. § 158(a)(1) (1989). Section 8 also prohibits discrimination in regard to hire or tenure of employment to encourage or discourage membership in a labor organization. 29 U.S.C. § 158(a)(3) (1989). It appears that the actions complained of fall within the proscriptions of the NLRA. They are, therefore, within the exclusive domain of the NLRB, and this Court cannot exercise original jurisdiction over them.

Defendant's motion is GRANTED, and the complaint is DISMISSED. All other motions are DENIED as MOOT.

IT IS SO ORDERED.

Thomas SCHIRO, Petitioner,

v.

Richard CLARK, and Indiana Attorney General, Respondents.

Civ. No. S83–588.

United States District Court, N.D. Indiana, South Bend Division.

Dec. 26, 1990.

After defendant's state capital [illegible] conviction was affirmed on direct ap[illegible] for 451 N.E.2d 1047, defendant peti[illegible] for writ of habeas corpus. The D[illegible] Court, Allen Sharp, Chief Judge, hel[illegible] (1) trial judge's decision to impose d[illegible] penalty after jury returned contrary re[illegible]mendation did not violate double jeop[illegible] (2) issues not raised in state proce[illegible] could not be considered for first [illegible] collateral review; (3) trial judge's [illegible] posttrial statement concerning de[illegible] did not indicate bias or prejudice th[illegible]lated defendant's rights; (4) defendan[illegible] not denied effective assistance of co[illegible] and (5) Indiana's death penalty statute [illegible] constitutional.

Writ denied.

1. **Criminal Law** ⇐636(9)

After state Supreme Court re[illegible] defendant's case to trial court for [illegible] entry reflecting reasons for dea[illegible]tence, defendant did not have righ[illegible] present when trial court entered [illegible] findings on remand. U.S.C.A. [illegible] Amend. 6.

2. **Double Jeopardy** ⇐111

State Supreme Court order [illegible] defendant's case to trial court fo[illegible] entry reflecting reasons for death [illegible] did not violate double jeopardy, w[illegible]mand was not because of insuffic[illegible]dence, but was designed to give S[illegible] Court more explicit statement of [illegible] for death sentence. U.S.C.A. [illegible] Amend. 5.

3. **Double Jeopardy** ⇐111

Trial judge's decision to impose death [illegible] after jury recommended that death [illegible] not be imposed did not violate dou[illegible] jeopardy, where jury's verdict was ad[illegible] under state law. West's A.I.C. 35-[illegible] U.S.C.A. Const.Amend. 5.

4. **Criminal Law** ⇐412.1(1)

Defendant's incriminating statements [illegible] of work release program in [illegible] defendant was serving sentence at [illegible] murder were not result of state[illegible] interrogation and did not violate [illegible] defendant's initiated conversa[illegible] with director, and director merely lis[illegible] defendant's voluntary statement. [illegible] Const.Amend. 5.

5. **Criminal Law** ⇐822(1)

[illegible] on verdict forms given to [illegible] first-degree murder case were re[illegible] to be examined as a whole to deter[illegible] whether they passed constitutional [illegible]

6. **Habeas Corpus** ⇐312

[illegible] not raised in state court pro[illegible] were not subject to collateral re[illegible] federal habeas corpus proceeding. [illegible] § 2254.

7. **Habeas Corpus** ⇐775(2)

[illegible] of whether search warrant was [illegible] violation of Fourth Amendment [illegible] be raised in federal habeas pro[illegible] where issue was fully and fairly [illegible] in state courts. U.S.C.A. Const. [illegible] 28 U.S.C.A. § 2254.

8. **Habeas Corpus** ⇐490(1)

[illegible] of whether letter written by peti[illegible] admissible in his state murder [illegible] it was not properly authenti[illegible] question of state law of evidence [illegible] not be considered by federal [illegible] on collateral review. 28 U.S.C.A. [illegible]

9. **Habeas Corpus** ⇐498

[illegible] error arising when trial court re[illegible] to instruct jury that it could not [illegible] defendant's demeanor in court [illegible] arriving at its verdict in murder [illegible] was not of constitutional varie[illegible]ty, and could not be considered for first time in federal habeas corpus proceeding. 28 U.S.C.A. § 2254.

10. **Constitutional Law** ⇐268(5)
Criminal Law ⇐700(3)

State's failure to disclose testimony of rebuttal witness who had allegedly been raped by defendant prior to trial did not violate due process in murder prosecution; witness' testimony was inculpatory, rather than exculpatory, and defendant did not rely on alibi defense. U.S.C.A. Const. Amend. 14.

11. **Habeas Corpus** ⇐480

Even if state's failure to disclose testimony of rebuttal witness who had allegedly been raped by defendant was error in murder prosecution, any error was harmless, where defendant admitted to 23 sexual attacks, of which incident with witness was only one, in effort to have jury conclude that he was mentally deranged. U.S.C.A. Const.Amend. 14.

12. **Criminal Law** ⇐1162

Constitutional errors in criminal trial are grounds of reversal unless they are harmless beyond reasonable doubt.

13. **Habeas Corpus** ⇐490(1)

In determining whether evidence of guilt was "overwhelming" as part of harmless error analysis, court is not to engage in reweighing of evidence to determine impact on jury's verdict; rather, court must examine all evidence to determine impact of objectionable evidence on jury's verdict.

14. **Criminal Law** ⇐854(1)

Refusing to sequester jury in murder prosecution was not constitutional error, where case was tried in small community with no local radio or television station and only weekly newspaper, and there was no showing that any juror was exposed to media coverage during trial.

15. **Costs** ⇐302.4

State trial court provided indigent defendant with sufficient expert psychiatric assistance to satisfy constitutional requirements in capital murder prosecution; two independent court-appointed psychiatrists

record under *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

It is also basic that this court does not act as a general court of common law review, but acts under a specific federal statute that limits its consideration to errors properly preserved and exhausted that are of a constitutional dimension. The Supreme Court of Indiana, in the direct appeal of this case in *Schiro v. State*, 451 N.E.2d 1047, the basic facts are stated as follows:

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on the nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist confirmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m. on February 5, 1981, the day Laura Luebbehusen's body was found. Schiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay." This story Schiro made up in order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had bet him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro and Luebbehusen talked about homosexuality and Luebbehusen told Schiro that she, too, was "gay." Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Laura Luebbehusen try to insert one into his anus. He found the experience too painful and told Luebbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to go buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

Schiro, 451 N.E.2d at 1049-1050.

[1] An issue was raised with regard to the so-called proportionality. The validity of any such issue in this case appears to have been laid aside by the Supreme Court of the United States in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), and reaffirmed in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The issue also appears to have emerged in regard to the double jeopardy clause of the Fifth Amendment of the Constitution for the United States, as made applicable to the states under the Fourteenth Amendment. The complaint seems to be that somehow the double jeopardy clause of the Fifth Amendment was violated. For a discussion of that clause recently by this court, see *United States v. Crampier*, 636 F.Supp. 396 (N.D.Ind.1986); *See also Grady v. Corbin*, — U.S. —, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). This argument seems to spring from the action of the Supreme Court of Indiana when by order of February 11, 1983, it remanded to the Brown Circuit Court for a written entry reflecting the reasons for this death sentence. Somehow it is contended that this action violates the Double Jeopardy Clause. Even more far fetched is the argument that somehow the petitioner had the right to be present when the Brown Circuit Court entered its written findings on that remand. He had no more right to be present then than he had a right to be present when the justices of the Supreme Court conferred on his case.

[2] In any event, it appears that *United States v. Cosentino*, 869 F.2d 301, 309 (7th Cir.1989), has answered that double jeopardy question adverse to the petitioner. Where a new entry was made on the basis of evidence already in the record, there is neither a constitutional right to be present when that formal entry is made by the state trial judge nor is the double jeopardy clause violated, the practice of appellate courts in remanding cases for more explicit findings is commonplace in both criminal and civil appeals. The Supreme Court of the United States has upheld a death sentence entered pursuant to a remand even when there is a deficiency in the first sentence. *See Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). It does not appear in this case that this remand was because of insufficient evidence, but it was designed to give the Supreme Court of Indiana a more explicit statement of the reasons for this death sentence. Such is altogether proper action by the Supreme Court of Indiana. *See Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1989). The Supreme Court has also dealt with the double jeopardy concept where there is a new sentencing

examined defendant as to competency to stand trial and insanity at time of trial.

16. Homicide ⇐354(1)

Defendant's sentence could not be enhanced in first-degree murder prosecution on grounds he manipulated jury by rocking in his chair while in jury's presence.

17. Constitutional Law ⇐268(8)
Criminal Law ⇐655(1)

Although state trial judge erred in expressing his moral indignation regarding defendant's murder case when he gave ex parte posttrial statement to newspaper reporter indicating that "the boy is going to fry," statement did not exhibit such bias or prejudice against defendant so as to violate defendant's due process rights. U.S.C.A. Const.Amend. 14.

18. Double Jeopardy ⇐103

Jury's failure to find defendant guilty on two counts of information charging defendant with murder did not amount to judgment of acquittal for double jeopardy purposes. U.S.C.A. Const.Amend. 5.

19. Double Jeopardy ⇐100, 103

It is constitutional condition precedent to application of double jeopardy clause of Fifth Amendment of the Constitution that there be an acquittal, whether there is acquittal depends largely on state law. U.S.C.A. Const.Amend. 5.

20. Criminal Law ⇐641.13(7)

Defendant charged with capital murder was not denied effective assistance of counsel on grounds defense counsel failed to present mitigating evidence at sentencing hearing, defense counsel presented evidence concerning defendant's personal history during guilt phase of trial, including testimony by defendant's father, then argued mitigating factors to jury and to judge at sentencing. U.S.C.A. Const.Amend. 6.

21. Criminal Law ⇐641.13(7)

Defendant has right to effective assistance of counsel at sentencing, however, strategic decision are accorded substantial deference. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⇐641.13(1)

There is presumption that effective assistance of counsel is rendered until contrary is shown, and burden is on defendant to do so. U.S.C.A. Const.Amend. 6.

23. Criminal Law ⇐641.13(6)

Defendant was not denied effective assistance of counsel in capital murder prosecution when defense counsel failed to make inquiry when defendant allegedly told him that state's witness had been coerced into testifying, where some of witness' testimony was favorable to defendant and was cumulative to testimony of court-appointed psychiatrist. U.S.C.A. Const.Amend. 6.

24. Habeas Corpus ⇐481

Evidence that petitioner was handcuffed and shackled outside courtroom during breaks in court proceedings and going to and from courthouse in state capital murder trial was not grounds for federal habeas relief, absent evidence that jurors saw petitioner in that condition. 28 U.S.C.A. §§ 2254, 2254(d).

25. Constitutional Law ⇐276(1)
Criminal Law ⇐1208.1(2), 1213.2(2)

Indiana's death penalty statute did not violate due process clause of Fourteenth Amendment, Sixth Amendment or Eighth Amendment on grounds it gave sentencing judge authority to impose death sentence even after jury had made contrary recommendation. West's A.I.C. 35-50-2-9, U.S.C.A. Const.Amends. 6, 8, 14.

26. Homicide ⇐356(2)

Factual record supported sentencing judge's decision to impose death penalty under Indiana's capital murder statute after jury recommended against imposing death sentence. West's A.I.C. 35-50-2-9.

Alex Voils, Indianapolis, Ind., for petitioner.

David A. Arthur, Deputy Atty. Gen., Indianapolis, Ind., for respondents.

MEMORANDUM AND ORDER

ALLEN SHARP, Chief Judge.

On December 28, 1983, this petitioner, Thomas Schiro, filed the within petition seeking relief under 28 U.S.C. § 2254. This case has been pending since and counsel has been appointed for this petitioner. The full state court record consisting of eight (8) volumes has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Numerous proceedings have been held, the most recent one an oral argument in Lafayette, Indiana on November 8, 1990.

This petitioner, Thomas Nicholas Schiro, was convicted of murder while committing or attempting to commit rape in the Brown Circuit Court, at Nashville, Indiana, on or about September 12, 1981. Although the jury in a bifurcated death penalty proceeding did not recommend the death penalty, the Honorable Samuel R. Rosen, the Judge of that court, imposed the death penalty on this petitioner on October 2, 1981.

On direct appeal to the Supreme Court of Indiana, the aforesaid conviction was affirmed in *Schiro v. State*, 451 N.E.2d 1047 (Ind.1983), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983).

An amended petition for post-conviction relief was filed in the Brown Circuit Court on May 11, 1984, and was heard by the Honorable James M. Dixon acting as special Judge. Judge Dixon denied that petition for post-conviction relief after a hearing on May 29, 1984, and the Supreme Court of Indiana affirmed the denial of post-conviction relief as reported in *Schiro v. State*, 479 N.E.2d 536 (Ind.1984), *cert. denied*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986) (Brennan and Marshall, J., dissenting).

When the second appeal got to the Supreme Court of Indiana in *Schiro v. State*, 519 N.E.2d 506 (1988), Justice Prentice concurred in the denial of post-conviction relief and in the opinion authored by Chief Justice Givan thereon. Only Justice DeBruler dissented, citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); and *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). A further petition for post-conviction relief was filed in the state court. Special Judge John Baker of Bloomington, Indiana, now a judge on the Court of Appeals of Indiana, heard that petition and denied same which was appealed to the Supreme Court of Indiana, which affirmed the decision of Judge Baker in *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989), *cert. denied*, — U.S. —, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). In that appeal, the Supreme Court, speaking through Justice Pivarnik, denied claims of ineffective assistance of counsel made under the Indiana Post Conviction Remedy Rule, and Justice DeBruler again dissented, primarily on the ground that the recommendation of the jury was an acquittal, triggering the protections of the double jeopardy clause. In this effort, he picked up the concurring vote of Justice Dickson.

Numerous proceedings have been held in this case, including a final oral argument in Lafayette, Indiana, on November 8, 1990, and this petitioner has had the benefit of able and experienced appointed counsel throughout these proceedings. An amended petition seeking relief under 28 U.S.C. § 2254 was filed here August 19, 1986, and that petition and the return addressing it form the issues to be decided by this court.

It is basic and elementary that this court is here engaged in collateral review which must focus only on constitutional issues properly raised and exhausted. *See Bell v. Duckworth*, 861 F.2d 169 (7th Cir.1988), *cert. denied*, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). There is nothing conceptual with reference to cases in which the death penalty is imposed that changes the basic scope of this court's collateral constitutional review under § 2254. As a matter of reality, it is to be noted that a good number of steps have been taken by the Court of Appeals in this circuit to insure that this variety of federal habeas review is done in a most careful fashion. In this vein, this court has made a full independent review of all of the state

hearing in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Certainly, if a new hearing can be constitutionally held, the Supreme Court of Indiana is well within its authority to request a more explicit written finding from the sentencing trial judge on the basis of the evidence already presented. Certainly, the double jeopardy clause of the Fifth Amendment of the Constitution of the United States does not inhibit that process. Neither is the confrontation clause of the Sixth Amendment of the Constitution of the United States violated in such a situation. *See Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

A far more fundamental concern is the simple fact that the jury recommended against the death penalty and Judge Rosen chose to impose one. The Indiana statute permits that to happen and that statute on its face passes constitutional muster. In this regard, it is necessary to here set out the statement of Judge Rosen:

PRONOUNCEMENT OF SENTENCE

The Defendant, having been found guilty by a jury on the 12th day of September, 1981, and the Court having entered judgment of conviction of the crime Murder/Rape, and on September 15, 1981, the Court having heard arguments by Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana, and Michael Keating, for the Defendant, and both the State and counsel for Defendant having moved to incorporate the evidence of the trial, which motion was granted by the Court, and the jury having returned their unanimous recommendation to the Court that the death penalty not be imposed on the Defendant, and the Court having reviewed the evidence of the trial thereafter, and having considered the written presentence report, gives the following reasons for the imposition of the sentence. The jury in its verdict of guilty of Murder/Rape, rejected the plea of insanity. The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard R. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community. David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense. The Defendant's own witness, a psychologist, Dr. Frank Osanka, indicated that the Defendant is 'overpowered by the need for erotic release.' Mary T. Lee, with whom the Defendant had lived, testified to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist. Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony. At no time has the Defendant indicated any remorse. These are aggravating circumstances.

The fact that the Defendant committed these crimes with gruesome, sadistic acts, including necrophilia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught. This is an aggravating circumstance.

The Defendant had been previously convicted of robbery, a class C felony, in Vanderburgh County, and was on work release when arrested for this crime. This is an aggravating circumstance.

This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced the jury in its recommendation.

The age of the Defendant is twenty years. This is not a mitigating circumstance, nor was the age of the victim, twenty-eight years, a mitigating circumstance.

For all of the above reasons, the Court now sentences the Defendant to death. The sentence is required by the Statutes of the State of Indiana, as all of the aggravating circumstances listed herein by far outweigh any mitigating circumstances.

The Court has no choice but to follow the law.

The Defendant is to be executed as by law provided on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff.

The petitioner through his counsel has been given the rare opportunity to have some sworn testimony by the sentencing judge which was elicited in post-conviction proceedings in the state court. One would hope that that does not become a regular tactic. A sentencing judge who imposes a death sentence has enough to worry about and should not be put on trial after the fact. It does not appear to this court to be necessary that a sentencing judge himself be put on trial and under oath before yet another judge to explain any sentence, including the death penalty. That is in the opinion of this Judge, not a very good way to properly manage the relationship between a trial judge and litigants and a trial judge and a reviewing appellate court. The procedure really creates many more problems than it solves, and such is the case here.

On the sentencing process, a presentence report was made available to this petitioner and his counsel which contained a mass of information, including an admission by the petitioner that he tried to manipulate people. An opportunity was provided to the petitioner and his counsel to comment on or object to the contents of that presentencing report. In fact, such a pleading was filed with reference to statements of a Dr. Crane. There is certainly evidence of the manipulative aspect of this petitioner's personality before the sentencing trial court.

[3] A double jeopardy argument is made with reference to the recommendation of the jury vis-a-vis the sentence of the trial judge. It is argued that the first judgment of the jury should preclude or bar a second judgment of the trial judge. However, the Indiana death penalty statute in Indiana Code § 35-50-2-9 places the sentencing function on the trial judge. A copy of the death penalty statute is marked Appendix "A" and attached hereto. The Supreme Court of the United States has specifically found that there is no constitutional requirement for so-called jury sentencing. *See Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Supreme Court of Indiana made the same decision in the first direct appeal at 451 N.E.2d at 1055. The so-called verdict of the jury in both Florida and Indiana are advisory. The same is also true in Alabama and the Supreme Court of the United States dealt with that statute in *Baldwin v. Alabama*, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). In *Baldwin*, 472 U.S. at 372, 105 S.Ct. at 2728, the complaint was that the sentencing judge gave too much consideration to the jury's recommendation. However, the Supreme

Court of the United States directly answered the constitutional question here posed in *Spaziano*, 468 U.S. at 467, 104 S.Ct. at 3156. Paralleling that conclusion, the Supreme Court of Indiana was constitutionally correct in its ruling on the direct appeal in 1983.

In his concurring and dissenting opinion at 451 N.E.2d at 1064, Justice DeBruler details the argument that the recommendation of the jury against the imposition of the death penalty is in fact a "verdict" that invokes the double jeopardy clause of the Fifth Amendment of the Constitution of the United States as the same is incorporated into the Fourteenth Amendment. The argument is comprehensively and well stated but most respectfully, that argument has been categorically rejected by a majority in the Supreme Court of Indiana. In his concurring and dissenting opinion, Justice Prentice parallels the argument made by Justice DeBruler and adds a number of points that find their foundation primarily in state law.

The mandate in Indiana appears to be that a sentencing trial judge in imposing the death penalty must find by clear and convincing evidence reasons for declining to follow the jury's recommendation. *See Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). An argument is made along the way that Judge Rosen considered the Indiana statute to mandate rather than allow the death penalty. That is not a correct reading of the Indiana statutes and there is nothing in this record to indicate that Judge Rosen finally had that understanding of the statute. Judge Rosen obviously felt very strongly that based on the record and the case which he had seen and heard, the death penalty *should* be imposed.

[4] In the trial itself on the merits, there is a claim that the state trial judge erred constitutionally in the admission of incriminatory statements made by the director of the work release program in which Schiro was serving a sentence at the time of the murder. It is contended that the admissions thereof were in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Those statements were not in violation of *Miranda*, 384 U.S. at 436, 86 S.Ct. at 1602. As a matter of fact, the Supreme Court has gone considerably farther than the state trial judge did here. In *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), the petitioner was questioned by a probation officer and confessed to a crime and that testimony was not prohibited by *Miranda*. In this case, the petitioner voluntarily sought to talk to someone, that person being one Kenneth Hood. The petitioner initiated the conversation and that finding of fact was made explicitly by the Supreme Court of Indiana in 451 N.E.2d at 1061. Such finding of fact is presumed to be correct under 28 U.S.C. § 2254(d), but this court has made an independent examination of the record in that regard under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, and is in complete agreement with the aforesaid finding by the Supreme Court of Indiana in this regard.

In this case, that officer was merely listening to a voluntary statement initiated by the petitioner and *Miranda* was not violated. This is not an example of state-sponsored interrogation. In this instance, the voluntariness of the statement was clearly established under the mandates of *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

[5] An attack is made upon the verdict forms that were submitted. The jury was given a one-page form containing three paragraphs of possible verdicts and a blank space for the date and foreperson's signature under each paragraph. The jury considered the following language:

> We, the jury, find the defendant not guilty.
>
> We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information.
>
> We, the Jury, find the defendant guilty while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct as charged in Count III of the information.

It is extremely doubtful that this rises to the level of a constitutional challenge. The jury was told that there could be a finding of guilty but mentally ill and that that applied to all three theories of murder. The instructions and verdict forms must be examined as a whole to determine whether they pass constitutional muster. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). It is important to note that this issue was not raised prior to the retirement of the jury.

[6] An effort is made to challenge the original charging information in a state court as being unverified. A facial examination clearly shows that it was indeed verified. The initial information dated and filed February 10, 1980, has been examined here. On April 9, 1981, there were requests for the death penalty filed by the Chief Deputy Prosector of Vanderburgh County, Indiana. That issue was never raised in the state courts and has been raised here for the first time. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989), Justice O'Connor stated:

> A rule announced in *Harris v. Reed* [489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)], assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one where the claim was *never* presented to the state courts. (emphasis added) 489 U.S. at 299 [109 S.Ct. at 1068-69].

It does not appear that the other concurring judges in *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060 are at odds with the above quoted statement of Justice O'Connor. Their focus was primarily on the problem of retroactivity of the rule established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, it seems clear that when *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060, and *Harris*, 489 U.S. 255, 109 S.Ct. 1038, are considered in tandem issues that were never raised in the state courts are the proper subject of procedural default in this collateral review under § 2254. Were it to be otherwise, there could never be an end to this kind of collateral review. If a defendant convicted in a state court proceeding could file continuous assertions of issues and claims not previously raised in the state courts, and then claim the benefits of *Harris*, it would be very difficult if not impossible, to ever bring a § 2254 proceeding to an end. *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) might provide a cutoff in such cases. *See also Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Certainly, this is a subject that has caught the attention of a special committee chaired by retired Justice Lewis F. Powell and a legislative solution to this kind of problem which pending in the Congress of the United States. However, under *existing* law, it appears that issues have not been raised in the state courts can and should be procedurally defaulted under the above analysis of *Harris v. Reed*, and *Teague v. Lane*.

Another effort is made to challenge whether *mens rea* was alleged in the charging information or is required by the relevant Indiana statute. Such issue does not appear to have been raised in any way in the state courts and under the above reasoning in *Harris* and *Teague*, cannot be presented here for the first time. It is subject to procedural default. There can be no question, however, that *mens rea* was an element of the crimes charged and that there was more than enough proof of its existence in the record in this case. Whatever conceptual merit this argument might have, it does not rise to a constitutional level in this case. *See Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

There is a charge that there is some variety of a due process violation, possibly a double jeopardy one, in that three Counts of murder with three allegedly different theories were charged when there was only one killing and one victim. This issue was never raised in the state courts and is raised for the first time here and is subject to procedural default under the above

and no local radio or television station. The record in this case in regard to any possible prejudicial publicity is light years away from *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), and *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This issue was raised primarily under the guise of ineffective assistance of counsel and was dealt with in the third opinion by the Supreme Court of Indiana at 533 N.E.2d 1201 et seq. It must be examined under the mandates of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *United States v. Grizales*, 859 F.2d 442, 447 (7th Cir.1988), Judge Eschbach, speaking for the court stated:

> The Supreme Court has instructed that in evaluating the performance of a trial attorney we are to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2054. Appellant "has a heavy burden in proving a claim of ineffectiveness of counsel." *Jarrett v. United States*, 822 F.2d 1438, 1441 (7th Cir.1987) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). The Supreme Court has further cautioned appellate courts to resist the temptation to "second-guess" the actions of trial counsel after conviction. *Id.* It is clear that the performance of trial counsel should not be deemed constitutionally deficient merely because of a tactical decision made at trial that in hindsight appears not to have been the wisest choice. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *United States v. Kennedy*, 797 F.2d 540, 543 (7th Cir.1986).

See also United States v. Adamo, 882 F.2d 1218 (7th Cir.1989). There is no showing that any juror was exposed to media coverage during trial. The Supreme Court of Indiana expressly made that finding at 533 N.E.2d at 1206. That finding, while presumptively correct, is also supported on the basis of an independent examination of the record under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446. *See Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984).

The burdens on a trial judge in a death penalty case are enormous. The appellate courts and the federal reviewing courts should not engage in second-guessing about how to best manage this awfully difficult judicial event. Each locale and each case has its own life and set of circumstances. There is nothing in this record to indicate that Judge Samuel Rosen violated the Constitution of the United States in his management, including lack of sequestration of this jury, during this trial. Most seasoned trial judges avoid sequestration of juries like the plague. Such is fraught with both personal and judicial problems. It is only when the factual record demonstrates that nothing short of sequestration will suffice should a reviewing court find a constitutional error. No basis to compel sequestration is to be found in this record.

[15] An issue is raised with reference to the claim that the state trial court failed to give this indigent petitioner expert psychiatric assistance. Even assuming that this somehow raises a constitutional right, this petitioner did have psychiatric assistance in the preparation of his defense in the person of Dr. Frank Osanka. The testimony challenging the credibility of Dr. Osanka was that of the petitioner himself. That testimony was specifically found to be incredible by the state trial judge who heard him. *See Schiro*, 533 N.E.2d at 1207. Assuming the best of this for this petitioner, his constitutional rights were not violated in that regard. There were two independent court-appointed psychiatrists who evaluated this petitioner as to both his competency to stand trial and his sanity at the time of the trial. Those psychiatrists did not conclude that the petitioner was insane but certainly the Constitution of the United States does not guarantee to a defendant charged with a serious death penalty crime the right to have a psychiatrist who will claim that he is insane. The mere statement of that proposition indicates its utter absurdity.

It should also be noted that the appointment of two independent court appointed psychiatrists meets the constitutional demands of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

[16] Much is made of the so-called rocking/non-rocking situation. That brief factual slice of the record probably has gotten considerably more attention than it deserves. Manipulation is not a basis in Indiana for imposing a sentence of death and was not used and the Supreme Court of Indiana specifically found that it was not used in this case. *See* 479 N.E.2d at page 559. The Supreme Court of the United States has said in a general way that a sentence may be enhanced if the sentencing trial judge believes that the defendant's testimony was perjured. *See United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). However, when a sentencing judge does enhance a sentence for that reason, a defendant is not generally entitled to a hearing on that issue. *See United States v. Bartunsky*, 879 F.2d 30, 43 (2nd Cir.1989).

There is a right to have a sentence based on reliable and accurate information. *See Tucker v. United States*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). *See also United States v. Harris*, 558 F.2d 366 (7th Cir.1977).

[17] One of the issues raised post-conviction and here is that Judge Samuel Rosen exhibited bias and prejudice against this particular petitioner because of an alleged ex parte and post-trial statement that the boy is going to live. Certainly, there is a long-standing right to an impartial judge, as defined by Chief Justice Taft more than 60 years ago in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In this regard, that court stated:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. *Wheeling v. Black*, 25 W.Va. 266, 270. But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

No such problem exists in this case. What is involved here is reactions of this state trial judge after the fact rather than before the fact. Criminal trials that are envisioned under the Sixth Amendment of the Constitution of the United States are enormously human events. Judges who preside over such criminal trials which involve the grossest kind of violence that is visited by one human being on another are not required to put their potential for moral indignation on the back shelf. When a defendant is charged with a serious crime, regardless of how grotesque the charge may be and how heinous the conduct of that defendant may be, it is the sworn task of a presiding trial judge to comply as evenhandedly as possible with the mandates of the due process clause in following the law and the basic concepts of fairness that inhere. It would certainly be a sad day for either the state or federal judiciary if judges were required to be or become valueless and morally neutral. It would also be a sad day for the state and federal judiciary if a veteran trial judge somehow through the process of experience became immune to normal feelings of moral indignation at heinous and violent criminal conduct.

The record in this case most certainly justified these private feelings of moral indignation by this veteran state court judge. However, Judge Rosen erred, although not in a constitutional sense. In a case tried by this Judge, *United States v. Marcyes*, 631 F.2d 525 (7th Cir.1980), an issue was raised with regard to a comment that this Judge made in the course of that trial. Chief Judge Bauer (then Judge) of the United States Court of Appeals suggested at page 535 that the comment would have been better left unsaid. Nonetheless, the verdict of guilty in *Marcyes* was upheld on appeal, and that bit of judicial conduct did not create a constitutional defect.

Understanding the cultural environment that pervades places like Nashville, Indiana, apparently Judge Rosen made a

analysis of *Harris v. Reed* and *Teague v. Lane*. In any event, there was a finding of guilty *only* on Count II.

[7] An issue under the Fourth Amendment with reference to a search warrant is raised. It is alleged that the affidavit to obtain the warrant, the return of the warrant and the items seized under the warrant were improperly allowed into evidence. It is alleged that the person who issued the warrant was not a neutral and detached magistrate. It is further alleged that in part, the warrant was based on information provided by Kenneth Hood, above referred to, which was obtained in violation of the *Miranda* rule. Since there was no *Miranda* violation in that regard, that part of the argument here fails.

It appears that the Fourth Amendment issue in this regard was fully and fairly litigated in the state courts under the mandates of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Once that decision is made, it is not to be litigated here. *See also Willard v. Pearson*, 823 F.2d 1141 (7th Cir.1987); *Wallace v. Duckworth*, 778 F.2d 1215 (7th Cir.1985).

On the first direct appeal, this issue is dealt with at 451 N.E.2d at 1061. Even aside from *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, the decisions of the Supreme Court of the United States in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) would authorize the issuance of a search warrant. Although it is doubtful if it is necessary to go to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), for salvation in this regard, certainly it also would provide a constitutional basis for the admission of the fruits of this search warrant.

There is some argument made that this issue was not fully and fairly presented to the state courts in the first instance under *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989), and *Cruz v. Warden of Dwight Correctional Center*, 907 F.2d 665 (7th Cir.1990). The court chooses not to bottom its decision in this regard on that concept, but rather bottoms it on the *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, concept.

[8] The next issue raised has to do with refusal of the state trial court to admit a letter allegedly written by the petitioner, but not admitted into evidence because of the failure to have the letter properly authenticated. This issue was presented to the Supreme Court of Indiana on direct appeal and resolved there at 451 N.E.2d at 1061 and 1062. It is highly doubtful if it raises a constitutional issue. At most it presents an issue of the state law of evidence which should not be interfered with by the federal judiciary on collateral review. It cannot be shown that its exclusion undermines the basic and fundamental fairness of these proceedings.

[9] Another issue is raised here for the first time regarding the modification of a certain instruction tendered by the petitioner. Again, this issue is foreclosed by the aforesaid reasoning in *Harris, and Teague*. In this regard, the defendant/petitioner tendered his instruction 15 which stated:

> The Defendant, Thomas Schiro, has not taken the witness stand as a witness. His failure to do so shall not, in any manner, be considered by you in arriving at your verdict, nor should you consider his appearance and demeanor in the courtroom during trial in arriving at your verdict.

In giving this instruction, the trial court struck therefrom "nor should you consider his appearance and demeanor in the court room during trial in arriving at your verdict." No authority is cited by this petitioner to demonstrate any errors here. Any error is not of the constitutional variety.

[10, 11] At trial, the state presented a rebuttal witness in the testimony of Linda Summerfield, sometimes called Linda Summerford. She allegedly was raped by the petitioner and recognized his picture as her attacker in the newspapers. A photograph or lineup was conducted and she picked out Schiro's picture in that display. There is a question here as to the Fourteenth Amendment duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *See also United States v. Jackson*, 780 F.2d 1305 (7th Cir.1986); *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir.1985); *United States v. Fairman*, 769 F.2d 386 (7th Cir.1985); and *Carey v. Duckworth*, 738 F.2d 875 (7th Cir.1983). However, it does not appear to this court that this evidence is *ex culpatory*. In fact, it was very much *in* culpatory. It should be noted that this is not a case in which the alibi defense was imposed as was the case in *Mauricio v. Duckworth*, 840 F.2d 454 (7th Cir.1987) *cert. denied*, 488 U.S. 869, 109 S.Ct. 177, 102 L.Ed.2d 146 (1988). Neither is the concept of reciprocal discovery in the alibi context of *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) applicable. Any earlier non-disclosure of the existence of the testimony of Linda Summerfield (Summerford) violated none of the due process rights of this petitioner. This court chooses not to bottom its decision in this regard on procedural default, since there was some reference to it in the state record. The petitioner apparently in an effort to have the jury conclude that he was mentally deranged, admitted to 23 sexual attacks of which the incident with Linda Summerfield (Summerford) was only one. In any event, the due process clause was not violated. Even assuming the existence of some error in failing to disclose this rebuttal witness, the same is harmless beyond a reasonable doubt.

[12] Constitutional errors in a criminal trial are grounds for reversal unless they are "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The petitioner is entitled to a fair trial not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). *See also Stein v. Duckworth*, 864 F.2d 1348, 1356 (7th Cir.1988); *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir.1988), *cert. denied*, 488 U.S. 841, 109 S.Ct. 110, 102 L.Ed.2d 85 (1988). The harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436. *See also United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017 (7th Cir.1988).

[13] The initial inquiry for the court then "is whether absent the constitutionally forbidden evidence, honest and fair minded jurors might very well have brought in not guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir.1986) (citing *Chapman v. California*, 386 U.S. 18, 26, 87 S.Ct. 824, 829, 17 L.Ed.2d 705 (1967)). The court must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States ex rel. Ross v. Fike*, 534 F.2d 731, 734 (7th Cir.1976) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). This circuit generally requires other evidence of guilt to be "overwhelming" before concluding a constitutional error was harmless. *See Nalls*, 864 F.2d at 1358; *Smith v. Fairman*, 862 F.2d 630, 639 (7th Cir.1988), *cert. denied*, 490 U.S. 1008, 109 S.Ct. 1645, 104 L.Ed.2d 160 (1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir.1987); *Burns*, 798 F.2d at 943; *United States v. Shue*, 766 F.2d 1122, 1133 (7th Cir.1985). But in making this determination the court is not to engage in a reweighing of the evidence to determine the impact on the jury's verdict. *Freed v. Abrahamson*, 841 F.2d 760, 765 (7th Cir.1988). Rather, the court must examine all the evidence to determine the impact of the objectionable evidence on the jury's verdict. *Id. See also United States v. de Ortiz*, 883 F.2d 515 (7th Cir.1989), and *United States v. Check*, 882 F.2d 1263 (7th Cir.1989).

[14] There is also a constitutional issue raised with regard to the sequestration of the jury and the admonitions with reference to media accounts. It should be remembered that this case was tried in Nashville, Indiana, in one of the smallest and least populated counties in the State of Indiana, a town with a weekly newspaper

Finally, the prosecuting authorities have a substantial interest in seeing that a defendant on trial for a capital case remains in custody and does not escape from a small, rural courthouse and the adjacent jail. *See Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). *See also Clark v. Wood*, 823 F.2d 1241, 1245 (8th Cir.1987), *cert. denied*, 484 U.S. 945, 108 S.Ct. 334, 98 L.Ed.2d 361 (1987).

It should be noted that counsel's memorandum filed on September 4, 1990, on behalf of the petitioner deals exclusively with the question of intentionality. Although of some constitutional dimension, counsel's memorandum contains more of a question of complying in rather straightforward criminal law terms with the requirements of the Indiana death penalty statute. Petitioner asserts that Judge Rosen did not make a specific finding of fact of an intentional killing. The Supreme Court of Indiana ruled in *Fleenor v. State*, 514 N.E.2d 80 (Ind.1987), that Indiana's death penalty statute survives a constitutional challenge because it requires a finding of specific intent.

The first time the Supreme Court of Indiana reviewed the petitioner's case on direct appeal, it found that, "with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen." *Schiro v. State*, 451 N.E.2d 1047, 1059 (Ind. 1983). This issue was held to be *res judicata* on petitioner's third post-conviction review. *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989).

[25] This court agrees with the Supreme Court of Indiana's determination that Indiana's death penalty statute is constitutional and that Judge Rosen complied with it in sentencing Thomas Schiro.

I.C. § 35-50-2-9 states:

a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

b) The aggravating circumstances are as follows:

1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

It is apparent that Justice Stevens and Justice DeBruler are judicially squeamish about the procedure under Indiana law, whereby a sentencing trial judge may impose a death sentence even after a jury has made a contrary recommendation. As a matter of federalism, the General Assembly of the State of Indiana has the option to enact such a procedure which on its face does not violate the due process clause of the Fourteenth Amendment, the Sixth Amendment, or the Eighth Amendment of the Constitution of the United States. Given the basics of federalism, this court should not disturb that state established procedure. *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

[26] With that procedural process established, the factual record must clearly support the imposition of the death penalty. The sentencing trial judge should not ignore the recommendation of the jury. However, that sentencing authority is fixed in that judge and not in the jury. The realities of the situation are that the sentencing judge faces a more rigorous standard in imposing the death penalty in the face of a contrary jury recommendation. The factual record must clearly justify the death sentence and the reasons given by the sentencing judge must be appropriate ones. The primary focus must be on the factual record as the foundation for the reasons stated. The values involved are far too important to become immersed in minor formalities. The Supreme Court of Indiana simply wanted from the sentencing trial judge a more complete statement of reasons for the imposition of the death penalty and it got same. Such procedure did not invoke the double jeopardy clause of the Fifth Amendment of the Constitution of the United States.

The reasons given for the imposition of the death penalty by the sentencing trial judge, both orally and in writing, have been fully set forth here. Those reasons spring from the factual record, are clearly reflected therein, and meet the constitutional standards currently applied by the Supreme Court of the United States in comparable cases.

It is a part of the *state* law of this case that the non-action of the jury on Counts I and III does not constitute an acquittal. It is not here necessary to write a constitutional treatise on the double jeopardy clause based on a hypothetical that some effort is being made to again try this petitioner on Counts I and III because that situation does not confront this court. In the reality of criminal prosecutions, it is commonplace for multiple and indeed alternative criminal charges to be submitted to a jury and for the jury to return a verdict on less than all of the charges submitted. It is not necessary for this court to determine whether there is perfect symmetry in the case law of Indiana in this subject area. In *this* case, *this* jury found *this* petitioner guilty of Count II and did not act on Counts I and III. The death penalty was imposed on Count II. There is nothing in the Fourteenth or Fifth Amendment of the Constitution of the United States that *compels* this court to label that non-action on Counts I and III as an acquittal for Fifth Amendment double jeopardy purposes. The Supreme Court of Indiana, with Justice DeBruler dissenting, did not so label it and a decent respect for the basic concepts of federalism does not compel this court to do otherwise.

Justice Stevens quotes Justice Powell, now retired, in stating that special and careful attention is required in regard to the consideration of death penalty cases. This court is in total agreement. No one can argue with those suggestions. The record in this case certainly reflects nearly a decade of state and federal court actions and reviews. More of the same will follow this decision. Notwithstanding the demands for special and careful review, this court must apply to the best of its ability and knowledge contemporarily established constitutional standards under the Eighth Amendment of the Constitution of the United States in its collateral review under 28 U.S.C. § 2254. With all deference and respect, it is the view here that such has been done.

In all of this review, it must be remembered that it was this veteran state trial judge who presided over all of the trial court proceedings resulting in the determination of guilt and it was he and not the reviewing appellate court and not this court, who saw all of the witnesses, heard and dealt with this case literally in all of its flesh and blood dimensions. In the precise areas of credibility determinations, the same should rest primarily and fundamentally with him and not with the reviewing courts, except upon a determination of a constitutional error.

There is no *constitutional* basis to disturb the imposition of the death penalty by this state trial judge in this case under 28 U.S.C. § 2254. Therefore, the writ must be DENIED. IT IS SO ORDERED.

APPENDIX A

35-50-2-9 Death sentence

Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

gratuitous ex parte out-of-court comment to a newspaper reporter and the deputy prosecuting attorney. The post-conviction state judge heard testimony from Judge Rosen, the newspaper reporter and the deputy prosecuting attorney in regard to this incident. Based on that testimony, that post-conviction relief state judge made a specific finding of fact that there was no bias or prejudice by Judge Rosen. That decision was upheld by the Supreme Court of Indiana. However, this does not excuse the fact that state trial judges who preside over cases in which the death penalty is or may be imposed have enormously delicate responsibilities. Speaking ex parte after the fact to a newspaper reporter or a deputy prosecutor does not serve that proper judicial function. This court has examined this slice of the record with the greatest of care and delicacy and is convinced that there is very substantial support for the conclusion of the state courts in this regard and is convinced that there was no violation of the constitutional right as defined in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437. The facts in *Tumey* are a far cry from those here.

[18] The petitioner was found guilty of the charge in Count II. Somehow it is now attempted to extrapolate the fact that there was no finding of guilty under Count I of the information into a finding that there was no intentional killing and therefore the death penalty is not appropriate. In order to get to that result, a number of large jumps in logic and fact are necessary. The facts are that the petitioner was found guilty in Count II. The jury did not fill out a verdict form on Counts I or Count III. Somehow this becomes a double jeopardy claim. This petitioner was not acquitted by Counts I or III and neither was he found guilty. He was found guilty on Count II.

[19] It is a constitutional condition precedent to an application of the double jeopardy clause of the Fifth Amendment of the Constitution that there be an acquittal. Whether there is an acquittal depends largely on state law. *See Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). *See also United States ex rel. Young v. Lane*, 768 F.2d 834 (7th Cir.1985), *cert. denied*, 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300 (1985). The Supreme Court of Indiana in the first direct appeal stated that the jury's recommendation was "an intermediate step" in the process toward the court's final judgment. *See* 451 N.E.2d at page 1056. There is an analogy, although not a perfect one, between this situation and inconsistent verdicts. *See United States v. Reed*, 875 F.2d 107 (7th Cir.1989). There is simply no constitutional merit to the argument that somehow the failure of the jurors to render any decision on Counts I and III some way or other constitutes an acquittal which extrapolates into a double jeopardy argument that frees this defendant petitioner.

When it is all said and done, the judge of the Brown Circuit Court engaged in a fully constitutionally adequate sentencing procedure that has been fully and carefully explained on the record and in writing. It does not suffer from any constitutional deficiencies which causes this court to set it aside on collateral review. This case has now been to the Supreme Court of Indiana three times. While there are justices on that court who have expressed concerns, the majority of that court in each instance has declined to undermine this sentence of death. That court's recent history indicates that it is perfectly capable of reversing a death sentence. *See Smith v. Indiana*, 547 N.E.2d 817 (Ind.1989). *Cooper v. Indiana*, 540 N.E.2d 1216 (Ind.1989), and *Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). It is also very clear that Justices of the present Supreme Court of Indiana are more than capable of rendering individualized judgment in criminal death penalty cases. The record here is evidence of that kind of review. The Supreme Court of the United States has denied certiorari in this case three times. This court would especially note the statement of Justice Stevens in *Schiro v. State*, — U.S. —, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). With the greatest respect for Justice John Paul Stevens, it is the fervent hope of this court that the issues about which he expressed concern have been dealt with here in the fashion that he suggested.

An issue is raised with regard to the effective assistance of counsel under *Strickland*, 466 U.S. at 668, 104 S.Ct. at 2054, which requires both unprofessional conduct and actual prejudice. *See United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1013-14 (7th Cir.1987). That issue was thoroughly examined in the third opinion of the Supreme Court of Indiana at 533 N.E.2d at 1207. While this court cannot rely on the correctness of the legal judgment in that regard, it can presume as correct the historical facts under 28 U.S.C. § 2254(d). However, under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, this court has made an independent examination of the record in this regard and finds the various attempts to nitpick after the fact the conduct of defense counsel to be little more than that. This defense counsel was confronted with a most difficult situation and did a job which met Sixth Amendment professional standards.

[20-23] There is a charge that this defense counsel failed to submit mitigating evidence during a sentencing hearing, relying on *Dillon v. Duckworth*, 751 F.2d 805 (7th Cir.1984), *cert. denied*, 471 U.S. 1108, 105 S.Ct. 2341, 85 L.Ed.2d 859 (1985). In *Dillon*, there was no insanity defense and the assertion of such a defense opens a very wide door with regard to the character and history of a defendant. During the guilt phase of the trial, the personal history of the defendant was brought forward, including testimony by his father. Defense counsel argued the mitigating factors to the jury and to the judge at sentencing. A defendant has a right to effective assistance of counsel at sentencing. *See Barden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). However, strategic decisions are accorded substantial deference. *See Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). There is a presumption that effective assistance of counsel is rendered until the contrary is shown and the burden is on the petitioner to do so. *See Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir.1989). Certainly, a defense counsel is not required to present mitigating evidence when none exists. *See Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir.1988). *United States v. Myers*, 917 F.2d 1008 (7th Cir.1990). It is further alleged that somehow the prosecution coerced Mary Lee into testifying and there was a failure to disclose so-called exculpatory evidence in this regard. This was raised as a claim of ineffective assistance of counsel in the state courts where it was claimed that the petitioner told his counsel that the state had threatened to take away Lee's child if she did not cooperate, but that the attorney did nothing about it. This claim appears to be at odds with the one made in the state court. Either the petitioner and his counsel knew about Mary Lee and it was therefore undisclosed, or they did not know and it should have been disclosed. Apparently, they can't have it both ways. In any event, there was no prejudice to the petitioner by the testimony of Mary Lee, some of which was indeed favorable to him. Testimony was also cumulative with reference to the testimony of the court-appointed psychiatrist. Certainly, her testimony did not change the outcome in this trial in favor of the petitioner. The record in this case, however, fails to disclose any coercion. In fact, the Supreme Court of Indiana found to the contrary at 533 N.E.2d page 1206. While that historical fact is presumptively correct under Title 28 U.S.C. § 2254(d), an independent examination of the record under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446 discloses that it is correct in any event.

[24] Last of all, there is an attempt to make an issue with regard to the handcuffing and shackling of the petitioner outside the courtroom during breaks in court proceedings and going to and from the courthouse. There is no evidence in the record that any juror saw the petitioner in that condition. In another case, *Osborne v. Duckworth*, 567 F.Supp. 427 (N.D.Ind. 1983), this court was very concerned about an incident in the Adams County Courthouse in Decatur, Indiana, and granted a habeas corpus petition under 28 U.S.C. § 2254 because of it. That decision was reversed in an unpublished opinion by the Court of Appeals. *See* 757 F.2d 1292 (7th Cir.1985).

APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT—Continued

Title	Docket Number	Date	Disposition	Trial Court County
Edwards v. Madison County	82-42	12-7-82	Affirmed	Madison
Hansor v. Board of Trustees	82-131	12-8-82	Rev'd & rem.	Madison
Harner v. Green	81-339	9-21-82	Affirmed	Madison
G.T.M., In re	81-442	12-3-82	Affirmed	Alexander
Johnson v. Hull	81-498	11-9-82	Affirmed	Saline
Lauer v. Potts	81-694	11-9-82	Affirmed	Monroe
Marquis v. County of St. Clair	81-584	12-3-82	Affirmed	St. Clair
Meadowbrook Public Water District v. Kraushaar	81-354	12-7-82	Affirmed	Madison
Meyer v. State Farm Mutual Automobile Insurance Co.	81-659	12-7-82	Rev'd & rem.	Clinton
Mitchell v. Massey	81-510	10-27-82	Aff'd in pt. & rev'd in pt.	St. Clair
Nestrick, In re Estate of	82-47	11-1-82	Affirmed	Fayette
Newberry v. Newberry	82-58	11-24-82	Affirmed	Madison
Pearson v. Herrin	81-487	12-2-82	Affirmed	Madison
People v. Burnley	81-403	11-22-82	Affirmed	St. Clair
People v. Cherry	81-244	10-21-82	Affirmed	St. Clair
People v. Dixon	81-531	11-12-82	Affirmed	St. Clair
People v. Goessman	81-199	11-22-82	Rev'd & rem.	Franklin
People v. Hamilton	81-243	12-6-82	Affirmed	St. Clair
People v. Hampton	82-8	11-22-82	Affirmed	Shelby
People v. Hayes	81-165	12-13-82	Affirmed	Madison
People v. Jackson	82-60	12-10-82	Affirmed	St. Clair
People v. Johnson	81-632	11-9-82	Affirmed	St. Clair
People v. Jones	81-453	11-22-82	Affirmed	St. Clair
People v. Kellick	81-807	11-1-82	Affirmed	St. Clair
People v. Martin	82-183	12-13-82	Rev'd & rem.	Johnson
People v. McBroom	82-340	12-2-82	Affirmed	Montgomery
People v. McKenzie	81-471	12-10-82	Aff'd in pt., rev'd & rem. in pt.	Montgomery
People v. McMullin	81-427	11-9-82	Aff'd in pt., vac. in pt. & rem.	Madison
People v. McNeil	81-415	11-30-82	Aff'd in pt., vac. in pt.	Alexander
People v. Newsum	82-24	12-2-82	Affirmed	Jackson
People v. Partee	81-383	10-21-82	Affirmed	St. Clair
People v. Price	81-577	11-9-82	Affirmed	Franklin
People v. Shimer	80-370	11-9-82	Affirmed	Jefferson
People v. Smith	81-295	12-7-82	Affirmed	Williamson
People v. Statham	81-302	11-30-82	Affirmed	St. Clair
People v. Young	81-368	10-27-82	Affirmed	St. Clair
People ex rel. Irby v. Homyer	81-328	11-9-82	Rev'd & rem.	Madison
Pistor, In re Marriage of	82-102	12-8-82	Affirmed	St. Clair
P.S., In re	81-579	12-3-82	Vac. & rem.	St. Clair
R.L.M., In re	81-568	12-10-82	Affirmed	Alexander
Schaffner v. Great Midwest Fur Co.	82-43	11-3-82	Affirmed	Randolph
Shields v. Schicktanz	81-322	10-25-82	Aff'd in pt. & rev'd in pt.	St. Clair
Shop City, Inc. v. East St. Louis & Interurban Water Co.	81-644	12-2-82	Reversed	St. Clair
Sullivan v. Sullivan	81-410	10-27-82	Aff'd in pt., rev'd in pt. & rem.	Jackson

Thomas N. SCHIRO,
Defendant-Appellant,

v.

STATE of Indiana, Plaintiff-Appellee.

No. 1181S329.

Supreme Court of Indiana.

Aug. 5, 1983.

Defendant was convicted in the Brown Circuit Court, Samuel L. Rosen, J., of murder while committing or attempting to commit rape, and he appealed. The Supreme Court, Pivarnik, J., held that: (1) death penalty statute is constitutional; (2) trial court did not err in imposing death penalty; (3) statement given by defendant was an involuntary custodial statement required to be excluded from trial; (4) master commissioner had authority to issue search warrant; (5) letter written by defendant was inadmissible; (6) it was not reversible error to omit certain verdict forms; and (7) presentence report did not contain improper information.

Affirmed and remanded.

DeBruler and Prentice, JJ., filed concurring and dissenting opinions.

1. **Criminal Law** ⇐1206.1(2)

Death penalty statute is not unconstitutional, although defendant contended that statute did not provide a procedure to ensure that death penalty is not arbitrarily and capriciously applied where statute ensures that in all instances where death penalty is applied, trial judge must submit written findings indicating aggravating factors found to be present, thus guarding against the influence of improper factors. IC 35-4.1-4-3, 35-50-2-9 (1982 Ed.).

2. **Criminal Law** ⇐986(3)

In all cases involving finding of aggravating circumstances, sentencing judge must include statement of reasons for sentence he imposes. IC 35-4.1-4-3 (1982 Ed.).

3. **Criminal Law** ⇐1206.1(4)

Death penalty statute permits a trial court to overrule a jury's recommendation that death penalty not be imposed. IC 35-50-2-9 (1982 Ed.).

4. **Criminal Law** ⇐1206.1(6)

A jury's decision to impose death penalty must be unanimous; if it cannot reach a decision, alternative sentence of life imprisonment is imposed. IC 35-50-2-9 (1982 Ed.).

5. **Criminal Law** ⇐163

Defendant was not placed in double jeopardy because trial court ignored jury's recommendation against death penalty and sentenced him to death, in that trial judge's determination was merely completion of single trial process in which jury recommendation was only an intermediate stage. IC 35-50-2-9 (1982 Ed.); U.S.C.A. Const. Amends. 5, 14.

6. **Courts** ⇐114

A nunc pro tunc entry is an entry made now of something which was actually previously done, to have the effect as of the former date and provide a record of an act or event of which no reference at all was made in the court's order book or which may serve to change or supplement entry already existing in order book.

7. **Courts** ⇐114

Nunc pro tunc entries must be based upon written memoranda, notes, or other memorials which must be found in records of case, must be required by law to be kept, must show action taken or orders or rulings made by court, and must exist in records of court contemporaneous with or preceding date of action described.

8. **Criminal Law** ⇐1181

It was proper to remand criminal prosecution and order trial court to comply fully with death penalty statute where trial court wrongly listed as aggravating circumstances its counterarguments to any possible mitigating circumstances available to the defendant. IC 35-50-2-9 (1982 Ed.).

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APPENDIX A—Continued

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

(E) Kidnapping (IC 35-42-3-2).

(F) Rape (IC 35-42-4-1).

(G) Robbery (IC 35-42-5-1).

(H) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either:

(A) the victim was acting in the course of duty; or

(B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction,

(B) under the custody of a county sheriff,

(C) on probation after receiving a sentence for the commission of a felony, or

(D) on parole,

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The victim of the murder was less than twelve (12) years of age.

(12) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

APPENDIX A—Continued

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As amended by P.L. 311-1983, SEC. 2; P.L. 120-1985, SEC. 2; P.L. 296-1988, SEC. 2; P.L. 148-1989, SEC. 6; P.L. 1-1990, SEC. 354.*

FAIRMONT HOMES, INC., Plaintiff,

v.

SHRED PAX CORPORATION, Defendant.

No. S90-140.

United States District Court, N.D. Indiana, South Bend Division.

Dec. 28, 1990.

Buyer brought action in state court against manufacturer of industrial shredder alleging breach of warranties, fraud, and breach of contract. Action was removed. Manufacturer moved to dismiss. The District Court, Miller, J., held that: (1) fraud was not pleaded with sufficient particularity warranting dismissal of count without prejudice, and (2) buyer stated cause of action for breach of warranties.

Granted in part and denied in part.

1. **Federal Civil Procedure** ⇐636

To state claim for fraud consistent with Federal Rules of Civil Procedure, plaintiff must identify particular statements and actions and specify why they are fraudulent; conclusory allegations do not satisfy pleading requirements and subject pleader to dismissal. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

2. **Federal Civil Procedure** ⇐636

Under federal rule, allegations of fraud cannot be based on information and belief, except as to matters within opposing party's knowledge, and in latter case, allegations must be accompanied by statement of facts upon which belief is founded. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

3. **Federal Civil Procedure** ⇐636

Although fraud counts which alleged defendant's scienter "on information and belief" may have been sufficient to state claim under procedural rules of Indiana in whose courts counts were initially filed be-

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firmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m., on February 5, 1981, the day Laura Luebbehusen's body was found. Schiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay". This story Schiro made up in order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had let him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro and Luebbehusen talked about homosexuality and Luebbehusen told Schiro that she, too, was "gay". Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Luebbehusen try to insert one into his anus. He found the experience too painful and told Luebbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle, and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

I

Defendant Schiro's first argument concerns the constitutionality of the Indiana Death Penalty statute, Ind.Code § 35-50-2-9 (Burns Repl.1979). Schiro states specifically that the death penalty does not provide for any proportionality review of death sentences by this Court. According to Schiro, the term "proportionality review" requires that the sentence handed down by the trial court be compared to sentences imposed in similar circumstances. This, Schiro urges, would insure that the death penalty is not arbitrarily and capriciously applied. Since Ind.Code § 35-50-2-9 does not explicitly mandate this form of review and this Court has allegedly failed to engage in such review, Schiro believes that the death penalty statute is unconstitutional.

Schiro admits that two recent cases have upheld the constitutionality of the Indiana death penalty statute. *Williams v. State* (1982) Ind., 430 N.E.2d 759, *appeal dismissed* (1982) ___ U.S. ___, 103 S.Ct. 33, 74 L.Ed.2d 47; *Brewer v. State* (1981) Ind., 417 N.E.2d 889, *cert. denied* (1982) ___ U.S. ___, 102 S.Ct. 3510, 73 L.Ed.2d 1384. *See also Judy v. State*, (1981) Ind., 416 N.E.2d 95. Schiro also notes that the United States Supreme Court, in *Proffitt v. Florida*, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, found the Florida death penalty statute, which is nearly identical to our death penalty statute, to be constitutional. *Compare* Ind.Code § 35-50-2-9 (Burns Repl.1979) *with* Fla.Stat.Ann. § 921.141 (West Supp.1982). While conceding that the procedure under our statute may be constitutional, Schiro argues that the following passage from *Proffitt* indicates the Supreme Court's mandate of proportionality review in cases involving the death penalty:

"The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State v. Dixon*, 283 So.2d 1, 10 (1973)."

428 U.S. at 250-51, 96 S.Ct. at 2966, 49 L.Ed.2d at 922.

Although Schiro has not raised this argument, and without going into great detail, we feel it is incumbent to note that this Court has consistently held that the death penalty does not violate the ban against cruel and unusual punishment, Article 1, § 16 of the Indiana Constitution. *Brewer, supra*, 417 N.E.2d at 894; *Adams v. State*, (1971) 259 Ind. 64, 74, 271 N.E.2d 425, 430, and cases cited therein. Similarly, the United States Supreme Court has held that the death penalty does not violate the Eighth Amendment of the United States Constitution. *Gregg v. Georgia*, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida*, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas*, (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929.

This Court has comparatively analyzed the Florida death penalty statute, approved in *Proffitt, supra*, and our own statute at great length. *Brewer, supra*, 417 N.E.2d at 897; *see also Judy v. State*, 416 N.E.2d at 107. Both statutes require the following prerequisites before a sentence of death may be imposed and executed:

"(1) A conviction of murder.

(2) A hearing for purposes of determining the sentence to be imposed, separate from the trial at which the issue of guilt was determined.

(3) In jury trials, a finding, by the jury, of at least one (1) of the aggravating circumstances enumerated in the statute.

(4) In jury trials, a finding, by the jury, that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(5) In jury trials, a recommendation by the jury, as to whether or not the death penalty should be imposed.

9. Criminal Law ⇐163

Nunc pro tunc entry of trial court clearly setting out trial court's reasons for imposing death penalty did not violate double jeopardy clause since all that was necessary was that trial court put its findings in proper form, no new determination of sentence was made, no new evidence was presented, and no reweighing of facts took place. IC 35-50-2-9 (1982 Ed.); U.S.C.A. Const.Amends. 5, 14.

10. Criminal Law ⇐994(4)

Nunc pro tunc entry putting trial court's findings with respect to imposition of death sentence in proper form complied with death penalty statute, although defendant contended that trial court did not take jury recommendation into consideration and did not exercise discretion but felt that death sentence was mandatory, where trial court did consider jury's recommendation and entire nunc pro tunc entry illustrated that trial court felt that requirements of law for imposition of death penalty had been satisfied. IC 35-50-2-9 (1982 Ed.).

11. Criminal Law ⇐1134(1)

The Supreme Court would not impose a stricter standard of review in situation where trial court and jury disagreed about imposition of death sentence, since it may have been that jury, which is to be involved in capital case only once, would be reluctant to impose more severe punishment. IC 35-50-2-9 (1982 Ed.).

12. Homicide ⇐354

Death penalty was not arbitrarily or capriciously applied to defendant, who intentionally killed victim while committing or attempting to commit rape, despite record showing that defendant engaged in bizarre sexual perversions at an early age and for some length of time, since evidence, as attested to by psychiatrists, indicated that defendant could have conformed his conduct to the law. IC 35-42-1-1(2), 35-50-2-9 (1982 Ed.).

13. Criminal Law ⇐412.2(3)

Miranda warnings do not have to be given in all interrogations.

14. Criminal Law ⇐518(1)

There was no need to give *Miranda* warnings to defendant where defendant voluntarily talked to director of his halfway house about the crime, defendant was not an object of suspicion, director was only talking to defendant upon his request and, although under rules of the facility, defendant could not leave unless he signed out on authorized business, residents were allowed to move about the facility and its grounds and one door was always left unlocked so that no custodial interrogation took place; thus, defendant's confession did not taint all evidence seized as a result.

15. Searches and Seizures ⇐3.4

Search warrant issued by master commissioner of the Vanderburgh Circuit Court was not invalid due to the Supreme Court's decision in *State ex rel. Smith v. Starke Circuit Court* holding unconstitutional those statutes giving a master commissioner power to exercise full jurisdiction over any probate matters, civil matters, or criminal matters, since power to issue search warrants was not held unconstitutional. IC 33-4-1-74.4(b), 33-4-1-75.1(c), 33-4-1-82.2(a, b) (1982 Ed.).

16. Criminal Law ⇐404(1)

Exhibits must be sufficiently identified to be admissible in evidence.

17. Criminal Law ⇐444

A letter alleged to have been received from a particular source is not admissible until its authenticity, identity, and genuineness have been sufficiently shown.

18. Criminal Law ⇐444, 1036.1(9)

In prosecution for murder while committing or attempting to commit rape, letter, allegedly written by defendant, and delivered by defendant's girl friend to doctor who treated defendant prior to murder for his problem with alcohol and drugs was inadmissible due to lack of authenticity, and any alleged error had been waived because defense counsel failed to resubmit evidence when defendant's girl friend took the stand.

19. Criminal Law ⇐1173.2(1)

There was no reversible error because of omission of verdict forms entitled "guilty of murder while committing and attempting to commit rape but mentally ill" and "guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill" where defendant failed to request any other verdict forms when situation was first brought to his attention; moreover, jury was informed that mentally ill verdict applied to murder/rape charge and murder/deviate conduct charge as well as murder charge.

20. Criminal Law ⇐986.4(3)

Conclusory language in presentence report which listed certain factors as "aggravating" did not invade province of trial court in determining existence of aggravating and mitigating circumstances under death penalty statute; mere fact that probation officer labeled certain factors as "aggravating" did not imply that trial judge would automatically agree, trial judge scratched the last reference to "aggravating factors," and defendant did not show that any portion of presentence report was illegal or that it should not have been presented to the trial judge.

Michael C. Keating, John D. Clouse, Laurie A. Baiden, Evansville, for defendant-appellant.

Linley E. Pearson, Atty. Gen. of Indiana, Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for plaintiff-appellee.

PIVARNIK, Justice.

Defendant-appellant, Thomas N. Schiro, was convicted of Murder While Committing or Attempting to Commit Rape, Ind.Code § 35-42-1-1(2) (Burns Repl.1979), at the conclusion of a jury trial in Brown Circuit Court on September 12, 1981. The trial court sentenced Schiro to death. He now appeals.

Schiro raises seven errors on appeal, concerning:

1) whether the Indiana death penalty statute, Ind.Code § 35-50-2-9 (Burns Repl. 1979), is unconstitutional because it fails to provide for adequate review of death sentences;

2) whether the trial court erred in imposing the death penalty;

3) whether a statement given by Schiro was an involuntary custodial statement and should have been excluded from trial;

4) whether the master commissioner of Vanderburgh Circuit Court had authority to issue search warrants;

5) whether the trial court erred in excluding a letter written by the defendant on the issue of his insanity;

6) whether the trial court supplied the jury with all the necessary verdict forms; and,

7) whether the pre-sentence report contained improper information.

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on one nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist con-

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"(e) If the [death penalty] hearing is by the jury, the jury shall recommend to the court whether the death penalty should be imposed.

* * * * * *

(2) ...

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

Schiro argues that the use of the word "whether" indicates that the sole purpose of the jury at the death penalty hearing is to render a recommendation of death only if it is justified under the facts. The legislative intent would make a jury recommendation of *no* death penalty binding upon the trial court. If the jury did recommend a sentence of death, the legislature also intended that the trial court could behave as a safety valve by overriding such a recommendation and imposing a sentence of years. Thus, Schiro argues, while a trial court may override a recommendation of death, it may not impose the death penalty if the jury holds otherwise.

We wrote in *Foremost Life Ins. Co. v. Dept. of Ins.*, (1980) Ind., 409 N.E.2d 1092, 1095–96:

"In interpreting a statute we are to ascertain and give effect to the intent of the legislature. *State ex rel. Baker v. Grange*, (1929) 200 Ind. 506, 510, 165 N.E. 239, 240; *Ervin v. Review Bd.*, (1977) Ind.App. [173 Ind.App. 592], 364 N.E.2d 1189, 1192; *Abrams v. Legbrandt*, (1974) 160 Ind.App. 379, 388, 312 N.E.2d 113, 118; *Marhoefer Packing Co. v. Indiana Dept. of State Revenue*, (1973) 157 Ind. App. 505, 516, 301 N.E.2d 209, 214.

In determining the legislative intent, the language of the statute itself must be examined, including the grammatical structure of the clause or sentence in issue .... Further, a statute is to be examined and interpreted as a whole, giving common and ordinary meaning to words used in English language and not overemphasizing a strict literal or selective reading of individual words. *Combs v. Cook*, (1968), 238 Ind. 392, 397, 151 N.E.2d 144, 147; *Abrams v. Legbrandt*, *supra*."

[3] The American Heritage Dictionary (1971 ed.) in its definition of "whether" says the word is "[u]sed in indirect questions to introduce one alternative: *We should find out whether the museum is open.*" Using the accepted definition of "whether", we find that under Ind.Code § 35-50-2-9, the jury is mandated to make a choice between the death penalty or no death penalty. Therefore, Schiro's argument, that the statute only allows the jury to recommend the death penalty, fails, and because of this, his assertion that the trial court may only reject death penalty recommendations also fails. We would also note that Schiro's premise (a recommendation against the death penalty is binding upon the trial court) thwarts legislative intent. Ind.Code § 35-50-1-1 (Burns Repl.1979) abolished the jury's role in determining or setting a sentence. *Debose v. State*, (1979) 270 Ind. 675, 676, 389 N.E.2d 272, 273. If we accept Schiro's argument, the trial court would be severely limited in imposing sentence under Ind.Code § 35-50-2-9 whenever a jury voted against the death penalty. Under the defendant's reasoning, the trial court would have no choice but to impose a term of years. Such action goes against the legislative intent of removing the jury's role in sentencing defendants. The jury plays an advisory role under Ind.Code § 35-50-2-9(e) and the trial court may properly override a jury's recommendation.

B

Schiro next argues that he was placed in double jeopardy because the trial court ignored the jury's recommendation and sentenced him to death. Having been given the chance to seek the death penalty before the jury, the State, Schiro urges, should not be given a second chance to litigate the same issues before the trial court. Schiro cites *Bullington v. Missouri*, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 in support of his position.

The *Double Jeopardy* Clause of the Fifth Amendment provides,

" ... that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' The Double Jeopardy Clause was made applicable to the states through the Fourteenth Amendment in *Benton v. Maryland*, (1969) 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. The Clause has been held to embody three separate but related prohibitions: (1) a rule which bars a reprosecution for the same offense after acquittal; (2) a rule barring reprosecution for the same offense after conviction, and; (3) a rule barring multiple punishment for the same offense. *North Carolina v. Pearce*, (1969) 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656."

Elmore v. State, (1978) 269 Ind. 532, 533–34, 382 N.E.2d 893, 894.

[4, 5] Defendant Schiro's reliance on *Bullington*, *supra*, is misleading. Missouri law explicitly requires the jury, not the trial court, to impose the death penalty in cases tried before a jury. Mo.Ann.Stat. § 565.006 (Vernon 1979). This involves a bifurcated proceeding where, after the defendant is convicted, the prosecution offers evidence in support of the death penalty. This hearing must be held before the same jury that convicted the defendant of murder. The jury must find at least one aggravating circumstance beyond a reasonable doubt and put its findings in writing. A jury's decision to impose the death penalty must be unanimous; if it cannot reach a decision, the alternative sentence of life imprisonment is imposed.

In *Bullington*, the defendant was convicted of murder but the jury fixed his punishment at life imprisonment. While the defendant's motion for a new trial or judgment of acquittal was pending, the United States Supreme Court decided *Duren v. Missouri*, (1979) 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579. That case held that the Missouri law allowing women to be exempted from jury duty deprived a defendant of his right under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross-section of the community. The trial court, relying on *Duren*, granted a new trial for defendant Bullington.

Defendant was again convicted of murder and the State sought the death penalty. The United States Supreme Court held that the second seeking of the death penalty, under the Missouri statute, violated the proscription against double jeopardy. The bifurcated proceeding requires the jury to determine whether the prosecution has proved its case. Analogizing the first jury's decision to impose life imprisonment to that of an acquittal (i.e., the jury could not find an aggravating circumstance beyond a reasonable doubt sufficient to impose a death sentence), and holding, of course, that an acquittal is absolutely final, the Supreme Court wrote that the prosecution is not entitled to another chance at the death penalty. 451 U.S. at 446, 101 S.Ct. at 1861–62, 68 L.Ed.2d at 283.

As the facts illustrate, *Bullington* was a unique decision that is clearly distinguishable from the situation presented here. Prior decisions held that the Double Jeopardy Clause did not prohibit the imposition of a harsher sentence on retrial, *North Carolina v. Pearce*, *supra*, but Bullington found an exception to that rule. The Supreme Court ruled that the Missouri sentencing hearing had the hallmarks of a trial on guilt or innocence. All issues are decided, reduced to written findings, and made binding since the jury's decision is the final determination of the sentence. In Indiana, the jury does not make a final determination of the sentence. It only releases an opinion of its recommendation, not an ultimate determination.

Schiro also argues that the jury's recommendation shows that the State failed to prove an aggravating circumstance beyond a reasonable doubt. This is not necessarily so. The statute does not require the jury to list its reasons for the recommendation. It could well be that a jury found the aggravating circumstance to be present, but felt it was outweighed by mitigating circum-

(6) A finding by the trial court of at least one (1) of the aggravating circumstances enumerated in the statute.

(7) A finding by the trial court that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(8) The completion, prior to carrying out the sentence, of an automatic expedited review of the imposed sentence by the Supreme Court of the State."

Brewer, 417 N.E.2d at 897.

We also felt in *Brewer* that Indiana is more restrictive than Florida in applying the death penalty. Indiana law requires that the sentencing hearing be before the same jury that tried the guilt issue, whereas Florida may, under certain circumstances, impanel a special jury for the hearing. *Id.* at 896. The standard of proof for a finding of at least one of the aggravating circumstances is beyond a reasonable doubt in Indiana, while Florida does not require a specified standard of proof. *Id.*

Still, regardless of the above distinctions, defendant Schiro would argue that under *Proffitt*, Indiana does not engage in a meaningful appellate review of death sentences. We disagree.

We interpreted the United States Supreme Court's holding in *Gregg v. Georgia*, *supra*, a companion case to *Proffitt*, to be that the death penalty may be applied " ... if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously." *Brewer*, *supra*, 417 N.E.2d at 897.

[1] It is clear that the imposition of the death sentence under Ind.Code § 35-50-2-9 is based upon the nature and circumstances of the crime and the character of the offender being sentenced. *Judy*, *supra*, 416 N.E.2d at 105. Also, this Court has adopted a rule wherein it has exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment, or a minimum sentence of greater than ten years. Ind.R.App.P. 4(A)(7). Therefore, because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment, we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana.

In addition, rules adopted by this Court govern the appellate review of sentences:

"Rule 1

AVAILABILITY—COURT

(1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.

(2) Appellate review of sentences under this rule may not be initiated by the State.

(3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.

Rule 2

SCOPE OF REVIEW

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Ind.R.App.Rev.Sen. 1 and 2.

[2] In all cases involving the finding of aggravating circumstances, the sentencing judge must include a statement of the reasons for selecting the sentence he imposes. This enactment, Ind.Code § 35-4.1-4-3 (§ 35-50-1A-3) (Burns Repl.1979), reads as follows:

"SENTENCING HEARING IN FELONY CASES.—Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) A transcript of the hearing;

(2) A copy of the presentence report; and

(3) If the court finds aggravating circumstances or mitigating circumstances a statement of the court's reasons for selecting the sentence that it imposes."

The above statute insures that in all instances where the death penalty is applied, the trial court judge must submit written findings indicating the aggravating factors he found to be present in imposing a sentence of death. This will guard against the influence of improper factors at the trial level and will make sure that the evils of *Furman v. Georgia*, (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, "arbitrary and capricious application" of the death penalty, were not present in the sentencing decision.

Not only do the trial court judge's written findings facilitate meaningful appellate review, this review is guaranteed to be thorough and adequate since we have before us the entire record of the proceedings, not just the sentencing hearing. *Brewer*, *supra*; *Judy*, *supra*. Thus, examination of the record, plus the sentencing hearing and the trial court's findings, protects each individual's constitutional rights.

Therefore, because of procedure mandated by statute, codified by rules, and controlled by cited precedent,

" ... this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures 'consistency, fairness, and rationality in the evenhanded operation' of the death penalty statute. *Proffitt v. Florida*, *supra*, 428 U.S. at 259–60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927. *See Gregg v. Georgia*, (1976) 428 U.S. 153, 194–95, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886–87. *Cf. Woodson v. North Carolina*, [428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944], *supra*; *French v. State*, [266 Ind. 276, 362 N.E.2d 834], *supra*. The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case. Therefore, we find our death sentencing procedures to be consistent and in full compliance with those required by the United States Supreme Court in *Gregg v. Georgia* and *Proffitt v. Florida*, and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution."

Judy, *supra*, 416 N.E.2d at 108.

We find no constitutional infirmities in the death penalty statute nor in the review that automatically follows the imposition of such sentence.

II

The next issue concerns the trial court's imposition of the death penalty. Defendant Schiro's argument may be divided into four sub-categories:

A. Whether Ind.Code § 35-50-2-9 permits a trial court to override a jury's recommendation that the death penalty not be imposed;

B. Whether the procedure established by Ind.Code § 35-50-2-9 places a defendant in double jeopardy;

C. Whether the imposition of the death penalty failed to conform to Ind.Code § 35-50-2-9; and,

D. Whether this Court, after reviewing the case at hand, should vacate the sentence of death.

A

Schiro's first dispute is with the following language found in Ind.Code § 35-50-2-9:

been satisfied. Perusal of the record shows that after careful consideration, the death penalty was deserved and justified. The language of the trial court may appear awkward but nowhere has the trial court or this Court attempted to apply anything resembling a mandatory death penalty. The *nunc pro tunc* entry complies with Ind.Code § 35-50-2-9.

D

In this last sub-paragraph of Issue II, Schiro urges this Court to overturn the death penalty. The main basis for his contention is that the trial court rejected the jury's recommendation that no death penalty be imposed. Schiro believes this Court should impose a stricter standard of review in situations where the trial court and jury disagree about the imposition of a sentence of death.

It is true that in *Gregg v. Georgia*, *supra*, the United States Supreme Court spoke of the important society function fulfilled by jury sentencing. 428 U.S. at 181-82, 96 S.Ct. at 2929, 49 L.Ed.2d at 879. But on the same day, in a companion case, *Proffitt v. Florida*, *supra*, the Supreme Court pointed out that it

> "has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

428 U.S. at 252, 96 S.Ct. at 2966, 49 L.Ed.2d at 929.

[11] In Issue I, we discussed the great care and scrutiny that goes into the review of all death penalty cases. While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty. Trial courts are presumed to know and understand the law. We have as great a confidence in the trial court's function in our judicial system as we do in the function of the jury. It may be that a jury which is to be involved in a capital case only once would be reluctant to impose this most severe form of punishment. This is not to say that all juries would be reluctant to do so, nor that trial courts are more callous and more inclined to impose a sentence of death. Rather, the trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity. This should result in greater consistency in sentencing. Furthermore, this Court, using the existing standards for appellate review of sentences, will ensure that the death penalty is not imposed where it is unreasonable to do so. We will not engage in a different standard of review where jury and trial court disagree.

After disposing of the defendant's four separate sub-categories, we now turn to examine whether the sentence of death is appropriate. The transcript of the sentencing hearing and the trial court's written findings show that the court found that Schiro intentionally killed Laura Luebbehusen while committing or attempting to commit rape. After examining the record, we agree with the trial court's findings. Mary Lee and Dr. Frank Osanka recounted the events as told to them by Schiro. Schiro saw the victim a couple of times prior to the day of the murder. He made up his mind that he would rape her and perform his "ritual." After work, Schiro pretended that his car broke down and thus gained access to Luebbehusen's apartment by requesting assistance. Once inside, Schiro persuaded her that he was homosexual but they eventually had intercourse. Dr. Osanka said he was not certain but he was almost positive that the victim was coerced into such activity. Schiro then attempted to get the victim in a comatose or drowsy state by having her consume alcohol and pills. One of his fantasies was to work in a funeral parlor and make love to the bodies of dead women. Sometime during this

process Schiro fell asleep but awakened when the victim tried to escape. He grabbed her, pulled her back in, and raped her. Later they left to purchase some alcohol and then returned, at which time Schiro raped the victim again.

Schiro fell asleep on the couch but awoke when the victim again tried to escape. This time Luebbehusen was fully dressed. Schiro forced her to lie down on the bed beside him. He believed that she fell asleep or passed out. At that point he decided to kill her. Grabbing a vodka bottle, he smacked it against her head and it broke. Luebbehusen started to protest but Schiro grabbed an iron and continued to beat her. Finally, he grabbed the victim around the neck and strangled her. Schiro then began his "ritual." He dragged the corpse into another room, undressed it, and sexually and sadistically assaulted it.

As for the mitigating factors, the trial court did not find any. The court found that the defendant had been engaged in numerous instances of prior criminal conduct. Psychiatrists testified to Schiro's numerous rapes and other criminal deviate conduct. Mary Lee testified about Schiro's sadistic assaults on her child. Another witness testified that Schiro raped her in the presence of her child. Although the defendant related instances of sexual perversion, sadism, necrophilia, exhibitionism, and voyeurism, both of the court-appointed psychiatrists felt that Schiro was in good contact with reality. Both men testified that Schiro was not insane, showed no remorse, was violent and sadistic, and both thought him to be a danger to the community.

The trial court said the defendant attempted to conceal his crime, thereby showing his appreciation for the wrongfulness of his conduct. The court also thought Schiro tried to delude the jurors into thinking he was mentally unstable by rocking back and forth only in their presence. The trial court failed to find that Schiro's age, twenty years, was a mitigating factor.

[12] We find that with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen. Although the record shows that Schiro engaged in bizarre sexual perversions at an early age and for some length of time, we also find that the evidence, as attested to by psychiatrists, indicated he could have conformed his conduct to the law. Such pitiful behavior should not serve as an excuse for the atrocious acts in this matter. The facts in the record, which show the horrifying nature of this rape/murder and the character of this offender, and the compliance of the trial court with the procedures of Ind.Code § 35-50-2-9, lead us to conclude that the death penalty was not arbitrarily or capriciously applied, and is reasonable and appropriate. The trial court is affirmed in the imposition of the death penalty.

III

Schiro argues on appeal that the statement he gave to Ken Hood, in which he admitted killing Laura Lubbehusen, should have been suppressed at trial. He claims that his confession was the result of a custodial interrogation and Ken Hood failed to give *Miranda* warnings prior to Schiro's statement. Schiro also argues that the illegal statement taints all evidence seized as a result of his confession. Such evidence would include Mary Lee's testimony because the police were directed to her through the statement, and objects taken from Schiro's room. Schiro feels that this evidence should have been excluded from the trial.

[13] *Miranda* warnings, *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, do not have to be given in all interrogations. In *Johnson v. State*, (1978) 269 Ind. 370, 375-76, 380 N.E.2d 1236, 1240, this Court wrote:

> "It is settled that the procedural safeguards of *Miranda* only apply to what the United States Supreme Court has termed 'custodial interrogation.' *Oregon v. Mathiason* (1977) 429 U.S. 492, 97 S.Ct. 711,

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stances. The judge's determination is based on the same standards as the jury's recommendation and he determines whether the aggravating circumstances has been proved beyond a reasonable doubt. His findings are put in writing so that we may adequately review them on appeal. The judge's determination was the completion of a single trial process of which the jury recommendation was only an intermediate stage. We find no error in the procedure used by the trial court in rejecting the jury's recommendation.

C

The original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty. We ordered the trial court to make written findings in this case, setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind.Code § 35-50-2-9. At the same time we afforded defendant Schiro the opportunity to file a brief contesting the *nunc pro tunc* entry of the trial court. The State was given the opportunity to oppose the defendant's brief. In the brief, Schiro argues that the *nunc pro tunc* entry is inappropriate; that he has been twice placed in jeopardy; and that the *nunc pro tunc* entry does not comply with Ind.Code § 35-50-2-9.

[6, 7] The State counters Schiro's first argument by contending that the *nunc pro tunc* entry simply restates the trial court's findings so that they conform with the requirements of Ind.Code § 35-50-2-9. A *nunc pro tunc* entry is

> "'an entry made now of something which was actually previously done, to have effect as of the former date.' *Perkins v. Hayward*, (1892) 132 Ind. 95, 31 N.E. 670. Such entries may provide a record of an act or event of which no reference at all is made in the court's order book, as was the case in *Neuenschwander v. State*, (1928) 200 Ind. 64, 161 N.E. 369, and *Warner v. State*, (1924) 194 Ind. 426, 143 N.E. 268, or they may serve to change or supplement an entry already existing in the order book as was the case in *Apple v. Greenfield Banking Co.*, (1971) 255 Ind. 602, 266 N.E.2d 13, and *Perkins v. Hayward*, *supra*. Such entries must be based upon written memoranda, notes, or other memorials which (1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings made by the court; and (4) must exist in the records of the court contemporaneous with or preceding the date of the action described. *Blum's Lumber & Crating, Inc. v. James et al.*, and *State ex rel. Buertich v. Perry County Council et al.*, (1972) 259 Ind. 220, 285 N.E.2d 822; *O'Malia v. State*, (1934) 207 Ind. 308, 192 N.E. 435; *Schoonover v. Reed*, (1879) 65 Ind. 313; *Pittsburgh etc. R. Co. v. Lamm*, (1916) 61 Ind.App. 389, 112 N.E. 45."

Stowers v. State, (1977) 266 Ind. 403, 410-11, 368 N.E.2d 978, 983. There has been precedent for *nunc pro tunc* entries in death penalty cases. In *Judy v. State*, *supra*, the record of the proceedings did not contain the written findings required in death penalty cases. The case was remanded and the trial court was instructed to enter written findings made *nunc pro tunc* effective the date of the sentencing hearing. Such actions are also common in cases involving enhanced sentences where the trial court does not comply fully with the mandate of *Gardner v. State*, (1979) 270 Ind. 627, 388 N.E.2d 513. *See e.g., Alleyn v. State*, (1981) Ind., 427 N.E.2d 1095. We request this specificity upon review so that

> "we [may] fulfill our responsibility to review the trial court's exercise of its judicial discretion. The trial court's statement is important also because it further serves to enlighten the defendant and the community as to the trial court's reasons for the imposition of an enhanced sentence, thereby greatly bolstering the public's confidence in the fairness and justice of our State's judicial process."

Spinks v. State, (1982) Ind., 437 N.E.2d 963, 968.

In a recent case, *Ehlinger v. Oklahoma*, (1982) 455 U.S. 104, 102 S.Ct. 869, 71

L.Ed.2d 1, the United States Supreme Court remanded a death penalty case to the Oklahoma Court of Criminal Appeals. The trial court had refused to consider, as a matter of law, the defendant's character and record of family history as a possible mitigating factor. The Supreme Court ruled that this was error and vacated the death sentence but at the same time remanded the case to the Oklahoma courts. It was made very clear that the Supreme Court would not weigh this evidence of family background; that was the role for the Oklahoma courts. Thus, the death penalty could be reinstated on remand if the Oklahoma courts found that the defendant's background was not sufficient to outweigh imposition of the death sentence.

[8] We also found it proper to remand this cause and order the trial court to comply fully with the death penalty statute. We did not demand a new decision; instead, we simply requested that the trial court provide its reasons for the harsher sentencing and these particular findings must be in the proper form. Only then may we adequately review the imposition of the death sentence. Ind.Code § 35-50-2-9 lists only nine aggravating circumstances which may be used in seeking the death penalty. In this case, it appears that the trial court listed wrongly as aggravating circumstances its counter-arguments to any possible mitigating circumstances available to the defendant. Thus, to ensure fairness to both sides, and to make certain that proper considerations were utilized by the trial court in imposing sentence, we felt that remanding the case so that the written findings conform with the death penalty statute was the proper remedy.

[9] In support of his double jeopardy argument, defendant Schiro again cites *Bullington*, *supra*, Issue IIB. Without going into great detail, we determined above that *Bullington* is not controlling on this matter. Here a judgment of death had been entered. All we requested was that the trial court put its findings in the proper form. No new determination of sentence was made, no new evidence was presented, and no reweighing of the facts took place. We fail to see how double jeopardy attached by remanding this cause for compliance with Ind.Code § 35-50-2-9.

[10] Finally, Schiro argues that the *nunc pro tunc* entry does not comply with Ind.Code § 35-50-2-9 for two reasons: first, the trial court did not take the jury's recommendation into consideration; and, second, that the trial court did not exercise any discretion but instead felt that the death sentence had to be mandatorily imposed.

Ind.Code § 35-50-2-9(e) reads that the "[trial] court shall make the final determination of the sentence, after considering the jury's recommendation . . . ." Schiro insists that the trial court failed to do this. An examination of the *nunc pro tunc* entry, however, reveals just the opposite. The trial court specifically stated that the jury had unanimously recommended that the death penalty not be imposed. Thus, the trial court was aware and cognizant of the jury's recommendation. Later, the trial court stated that the defendant continually "rocked" only in the jury's presence, and that this "fact may well have influenced and misled the jury in its recommendation." It is evident that the trial court did consider the jury's recommendation.

Schiro also takes issue with a passage in the *nunc pro tunc* entry. After carefully weighing all the mitigating circumstances, the trial court stated that "the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law." Schiro argues that this makes for a mandatory imposition of the death penalty.

The imposition of a mandatory death penalty is contrary to constitutional considerations. *Woodson v. North Carolina*, (1976) 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *French v. State*, (1977) 266 Ind. 276, 362 N.E.2d 834. The entire *nunc pro tunc* entry illustrates that the trial court felt that the requirements of the law, which calls for the death penalty only after strict consideration of all possible mitigating circumstances, had

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fendant Schiro argues that the objection should have been overruled because the exhibit was relevant, material, and competent evidence, and was not in violation of any rules of evidence.

[16, 17] In the appellate brief, Schiro also argues that the letter should have been admitted because a plea of insanity "opens wide the door to all evidence relating to the defendant and his environment." *Wilson v. State*, (1966) 247 Ind. 454, 461, 217 N.E.2d 147, 151. This is true but exhibits must be sufficiently identified to be admissible in evidence. *D.H. v. J.H.*, (1981) Ind.App., 418 N.E.2d 286; *Leslie v. Ebner*, (1918) 67 Ind. App. 32, 118 N.E. 829. A letter alleged to have been received from a particular source is not admissible until its authenticity, identity, and genuineness have been sufficiently shown. 13 I.L.E. *Evidence* § 162 (1959); 29 Am.Jur.2d *Evidence* § 879 (1967).

[18] Dr. Abendroth said he could recognize Schiro's handwriting, probably because he received three or four prior letters from Schiro, but never explained how he knew the letters were actually written by Schiro. Defense counsel never asked Abendroth if he saw Schiro write the letters or if Schiro personally delivered them and said they were written by him. This lack of authentication was the basis for the trial court sustaining the objection to the letter's introduction. Mary Lee, not Schiro, delivered the letter to Dr. Abendroth. Due to this fact, defense counsel could have had Mary Lee authenticate the letter when she testified later in the trial, but defense counsel failed to do this. We find that in addition to the lack of authenticity, any alleged error on this issue has been waived because defense counsel failed to resubmit the evidence when Mary Lee took the stand.

VI

When the jurors were ready to begin their deliberations, the trial court gave them the following verdict forms:

1) Guilty of Murder as charged in Count I
2) Guilty of Murder/Rape as charged in Count II
3) Guilty of Murder/Deviate Conduct as charged in Count III
4) Guilty of Voluntary Manslaughter
5) Guilty of Involuntary Manslaughter
6) Not guilty
7) Not responsible by reason of insanity
8) Guilty of Murder but mentally ill
9) Guilty of Voluntary Manslaughter but mentally ill
10) Guilty of Involuntary Manslaughter but mentally ill

The Guilty of Murder/Rape verdict was returned on September 12, 1981. The jury was allowed to go home and was instructed to return on September 15 for the penalty phase of the trial. Before the jury returned on the 15th, defense counsel made a motion to reject the verdict because two verdict forms were not submitted to the jury. After some discussion this motion was denied and the penalty phase of the trial began. On appeal, defendant Schiro argues that it was reversible error to omit the following forms: Guilty of Murder while committing and attempting to commit rape but mentally ill; and Guilty of Murder while committing and attempting to commit Criminal Deviate Conduct but mentally ill.

In *Himes v. State*, (1980) Ind., 403 N.E.2d 1377, 1382, this Court wrote:

> "We have previously held that when the jury was permitted to retire without sufficient forms of verdict, the number of forms submitted cannot be considered as reversible error where the record does not show that the accused tendered or requested any other forms. *Bowman v. State*, (1934) 207 Ind. 358, 192 N.E. 755; *Kirkland v. State*, (1956) 235 Ind. 450, 134 N.E.2d 223."

[19] An examination of the hearing on the September 15th motion reveals that the trial court originally raised the question of insufficient verdict forms. At that time defense counsel did not request that any additional verdict forms be submitted but apparently changed his mind a few days later. Thus, we find no reversible error because defendant failed to request any other verdict forms when the situation was first brought to his attention. *Himes, supra*.

The trial court also mentioned that Defendant's Instruction 3 informed the jury that the verdict of guilty but mentally ill was submitted to them on all counts of the information. Thus, the jury was informed that the mentally ill verdict applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder. Defendant has failed to show any prejudice on this issue. *Johnson v. State*, (1982) Ind., 432 N.E.2d 408, 405. There is no reversible error on this issue.

VII

[20] Finally, defense counsel moved to strike a portion of the presentence report which listed certain factors as "aggravating." Defendant Schiro feels that this conclusory language invades the province of the trial court in determining the existence of aggravating and mitigating circumstances under Ind.Code § 35-50-2-9. The presentence report recommended that Schiro receive a severe penalty. Defendant moved to have the recommendation section removed from the report, but was overruled by the trial court, although it did delete one sentence which characterized various factors as aggravating circumstances.

Ind.Code §§ 35-4.1-4-9, -10 (35-50-1A-9, -10) (Burns Repl.1979) provide for the making of a pre-sentence report in order to assist the judge in sentencing. Some factors the probation officer may take into account include "the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education and personal habits." Ind.Code § 35-4.1-4-10 (35-50-1A-10). Furthermore, this Court wrote in *Lotte v. State*, (1980) Ind., 406 N.E.2d 632, 640:

> "[T]he Court of Appeals held [in *Halligan v. State*, (1978) 176 Ind.App. 472, 375 N.E.2d 1151] that the pre-sentence investigation and report may include any matter which the probation officer deems relevant to the question of sentence. These matters obviously could be in favor of or against the defendant and are presented in the report as a finding or an opinion of the probation officer. The defendant is, of course, given the opportunity to rebut any and all of these matters. . . . The United States Supreme Court has stated that it is essential for a sentencing judge to be as well informed as possible concerning the defendant's life and characteristics in order to select an appropriate sentence. The Court further stated that:' . . . modern concepts individualizing punishment have made it all the more necessary to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.' *Williams v. New York*, (1949) 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337, 1343."

Schiro was given the opportunity to refute the allegations made in the report. It appears that Schiro had a "personality conflict" with the probation officer because she was a woman and he also contested portions of the report wherein he admitted making false statements in order to receive leniency for earlier crimes. The sentencing judge listened patiently to everything Schiro had to say and then gave his decision. Trial court judges are presumed to know and understand the laws of this state. The mere fact that the probation officer labeled certain factors as "aggravating" does not imply that the judge would automatically assume that this is so. As the record shows, the trial judge did scratch the last reference to "aggravating factors." Defendant Schiro has not shown that any portion of the pre-sentence report was illegal or that it should not have been presented to the trial judge.

We affirm the trial court in all matters and in the imposition of the death penalty. This cause is remanded to the trial court for the purpose of setting a date for the death sentence to be carried out.

GIVAN, C.J., and HUNTER, J., concur.

50 L.Ed.2d 714; *Bugg v. State*, (1978) Ind., [267 Ind. 614] 372 N.E.2d 1156, 1158. Custodial interrogation refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Mathiason, supra*, 429 U.S. at 494, 97 S.Ct. at 711, 50 L.Ed.2d at 719. The concept of custodial interrogation does not operate to extend the *Miranda* safeguards to spontaneous voluntary statements, i.e. statements which are either not made in response to questions posed by law enforcement officers while the defendant is in custody, *Bugg v. State, supra*, or statements which are made before the officers are given an opportunity to administer the *Miranda* warnings. *New v. State* (1970) 254 Ind. 307, 259 N.E.2d 696."

Schiro argues that Ken Hood was a law enforcement officer who interrogated him in Hood's office. The State strongly argues that Hood, as director of the Second Chance Halfway House, was not a law enforcement officer and no interrogation took place. Both parties have cited other jurisdictions in support of their view on Hood's law enforcement status. We do not find it necessary to determine whether Hood was a law enforcement officer, although Hood stated that he had no ties to any law enforcement agency, was not a sworn peace officer, and was not responsible for the investigation of any criminal activity. From the facts presented in this case, our first point of inquiry is to determine whether a "custodial interrogation" took place. Cases from both the United States Supreme Court and this Court have stated that *Miranda, supra*, does not apply outside the inherently coercive custodial interrogation for which it is designed. *Roberts v. United States*, (1980) 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622, 631; *Smith v. State*, (1981) Ind., 419 N.E.2d 743, 747. We examine all the facts to determine whether custodial interrogation took place.

A perusal of the record covering the suppression hearing and Hood's testimony at trial reveals the following. On the day in question, Schiro approached his work release counselor, a Mr. Williamson, and said that he had something "heavy" to discuss. Williamson was busy checking the sign-in, sign-out sheets to see whether any of the residents were out of the building during the time Laura Lubbehusen was murdered. Williamson was doing this under Hood's direction. Hood stated that while he did not think any of the residents were involved in the murder, he was afraid adverse publicity might arise because the victim's car was found near the Second Chance Halfway House. Therefore, he wanted to counter any possible bad publicity by showing that all the residents were in the facility when the crime occurred. Williamson thought Schiro's problem concerned his alcoholism and said that if it was serious, Schiro should go see Hood. Williamson called Hood and told him Schiro was on his way to discuss a problem.

Hood stated that he and the staff are strictly concerned in treating the individual resident's problems. In fact, Schiro had been in his office earlier that day and they discussed transferring him to another facility where Schiro could receive better treatment for his drinking problem. When Schiro arrived, Hood said he seemed nervous and upset but did not appear to be under the influence of alcohol or drugs. After ascertaining that Schiro's alcoholism was not the reason for this conversation, Hood started asking Schiro general questions. Hood felt that Schiro wanted to talk but appeared uncertain as to what he wanted to discuss. Hood thought that some general questions might calm him down. Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station.

[14] We do not find that these facts show a custodial interrogation took place. Schiro voluntarily wanted to talk to someone about this crime. He was not the object of suspicion by Hood or anyone else, and Hood was only talking to Schiro upon Schiro's request. Schiro argues that under the rules of the facility, he could not leave unless he signed out on authorized business. Thus, he feels that he was in custody anywhere in the building. Hood stated that the residents could move about the facility at their leisure, stroll the grounds, and one door was always left unlocked. Regardless, Hood also said that he was not keeping Schiro in his office and he was free to leave at any time. Schiro was never placed in physical custody or restrained in any way. Schiro approached Hood, not vice versa. We fail to see that Schiro was coerced, either blatantly or inherently, into making a confession. There was no need for *Miranda* warnings from Hood.

Due to the disposition of the above issue, we also hold that Schiro's confession does not taint all evidence seized as a result of his statement. Therefore, Mary Lee's testimony and evidence taken from Schiro's room were properly admitted at trial.

IV

[15] Defendant Schiro argues that the search warrant issued by Maurice O'Connor, acting as Master Commissioner of the Vanderburgh Circuit Court, is invalid due to this Court's decision in *State ex rel Smith v. Starke Circuit Court*, (1981) Ind., 417 N.E.2d 1115. Due to the alleged defective nature of the search warrant, which was State's Exhibit 45, Schiro argues that all evidence seized because of the search warrant, such as his blood-stained coat, should not have been introduced at trial.

Defendant Schiro is in error on this issue. *State ex rel. Smith v. Starke Circuit Court* dealt with statutes providing for appointment of commissioners by circuit courts of Starke, Vanderburgh, and St. Joseph counties. The opinion was handed down on March 23, 1981, and we held that the holding shall have only prospective application and shall apply to or affect only those cases which had not yet reached final judgment or had not yet had a ruling on the motion to correct errors. *Id.*, 417 N.E.2d at 1124. The search warrant in this cause was issued in February, 1981, and the trial began in September, 1981; therefore, Schiro is correct in stating that his pending trial fell within the ambit of the opinion's prospective application. However, we declared only the following sections to be unconstitutional: Ind.Code § 33-4-1-74.4(b); 33-4-1-82.2(b); and 33-4-1-75.1(c) (Burns Supp. 1980). Those sections gave the master commissioner power to exercise full jurisdiction over any probate matters, civil matters, or criminal matters, but we did not hold the power to issue search warrants to be unconstitutional. The statute for Vanderburgh county states in pertinent part that the "master commissioner may conduct preliminary hearings in criminal matters and issue search warrants and arrest warrants and fix bond thereon, and he may enforce court rules." Ind.Code § 33-4-1-82.2(a) (Burns Supp.1982). The search warrant was properly issued and evidence seized was properly introduced at trial.

V

Dr. Walter Abendroth was called by the State to testify about defendant Schiro's mental state. Dr. Abendroth had been treating Schiro prior to the murder. Most of this treatment dealt with Schiro's problem with alcohol and drugs. On cross-examination, the defense attempted to introduce a letter, allegedly written by Schiro, which Mary Lee delivered to Dr. Abendroth. The State objected on lack of foundation of Abendroth's ability to authenticate the letter as one written by Schiro. The trial court sustained the objection. De-

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one of those same questions of fact in a manner contrary to the manner in which the jury resolved it. Under our legal tradition, the determination of fact by a jury in favor of the defendant in a criminal case is not subject to being resolved at a later date by a judge in such a manner as to place the defendant in a worse position.

In the case of *United States v. DiFrancesco*, (1980) 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328, it is said:

"The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action." 449 U.S., at 142, 101 S.Ct., at 440.

Here the statutory label is "recommendation". The substance beneath it is a factual adjudication and moral judgment of the jury, not a court master, not a court commissioner, but a jury of twelve, that the human qualities which warrant imposition of the death penalty are not present in Thomas N. Schiro. This favorable jury determination was awarded in a fair and open adversarial confrontation with the prosecutorial forces of the State. Since that award came from a jury after a full-blown trial, a judge, applying the same rational and specific standards as the jury was required to use, cannot, consistent with the protection of the guarantee against double jeopardy, upon making contrary factual findings, take it away.

II.

The nunc pro tunc entry of the judge first notes that the verdict of the jury finding appellant Schiro guilty of murder while committing or attempting the crime of rape as charged in Count II was returned to court on September 13, 1981. The jury reconvened on September 15, 1981 and a death sentence hearing was held pursuant to Ind.Code § 35-50-2-9 resulting that day in a recommendation that the death penalty not be imposed. It further reflects a sentencing hearing was held on October 2, 1981, and continues in part pertinent to the judge's final determination that the sentence of death be imposed:

"On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, Subsection [1] The Aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) the mitigating circumstances that may be considered under this section are as follows: "

At this point in the entry, the judge notes each mitigating circumstance and upon consideration of evidence rejects each possibility. After proceeding through that, the entry continues:

"Since the State proved 'beyond a reasonable doubt that existence of at least (1) of the aggravating circumstances alleged', (Indiana Code § 35-50-2-9, Section 9[9]) and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise."

Indiana Code § 35-50-2-9, the death sentence statute, provides in pertinent part as follows:

"(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b) of this section. *In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.*

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

* * * * * *

(c) The mitigating circumstances that may be considered under this section are as follows:

* * * * * *

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation." (Emphasis added.)

Indiana Code § 35-50-2-9(e)(2) requires the sentencing judge to make the final determination of whether the death penalty should be imposed "based upon the same standards that the jury was required to consider." The standards referred to are the two listed in the same paragraph of the statute, the first of which is:

"(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and"

The aggravating circumstance alleged in Count IIA is as follows:

"(1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information. "

According to the requirements of these provisions, it was necessary for the sentencing judge to *personally* conclude as a trier of fact that the State, at the sentencing hearing before the jury, proved to a moral certainty beyond a reasonable doubt that Thomas Schiro strangled and thus killed Laura Luebbehusen while committing or attempting to commit a rape upon her, and at the time his mind had formed the *mens rea* identified by Ind.Code § 35-41-2-2 as "intentional", i.e., that he had had a conscious objective to strangle and kill. I can

DeBRULER, J., concurring and dissenting with separate opinion.

PRENTICE, J., concurring and dissenting with separate opinion.

DeBRULER, Justice, concurring and dissenting.

Following the jury sentencing hearing, the jury, after deliberating for one hour, returned a unanimous recommendation that the death penalty not be imposed. Two weeks later at the judge sentencing hearing, the judge overrode that recommendation and sentenced appellant to die. The conviction should be affirmed, but several independent legal grounds exist which require the penalty of death to be vacated.

I.

Upon considerations going to the meaning and spirit of the Double Jeopardy Clause of the Fifth Amendment and the like provision of the Indiana Constitution, Art. 1, § 14, a sentencing judge cannot be permitted to override a jury recommendation of no death penalty arrived at pursuant to the death sentence statute, Ind.Code § 35-50-2-9. A jury verdict of not guilty on the issue of guilt or innocence is absolutely beyond the authority of judges to override. *Fong Foo v. United States*, (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629. This fixed and unyielding characteristic of the jury verdict of acquittal exists by reason of the pronouncements of courts that the Double Jeopardy Clauses require it to exist. No state statute or act of Congress can change this. Only a constitutional amendment could do so. Justice Blackmun for the United States Supreme Court in *Bullington v. Missouri*, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270, in referring to the immutability of the verdict of acquittal states:

"The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die.

'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.' *Green v. United States*, 355 U.S. [184], at 187–188, 78 S.Ct. [221], at 223–224 [2 L.Ed.2d 199].

See also *United States v. DiFrancesco*, 449 U.S. [117], at 136, 101 S.Ct. [426], at 437 [66 L.Ed.2d 328]. The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' *id.*, at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.' *Addington v. Texas*, 441 U.S. [418], at 424, 99 S.Ct. [1804], at 1808 [60 L.Ed.2d 323]." 451 U.S. at 445–446, 101 S.Ct. at 1861–1962.

That court went on to announce that the sentencing proceeding before the Missouri jury was like the trial on the question of guilt or innocence, and that as a consequence thereof, a resultant jury rejection of the death penalty, by reason of the Double Jeopardy Clause has the same immutable characteristic as the jury verdict of not guilty. Appellant contends that the jury recommendation against imposition of the death penalty under the Indiana death sentence statute should be treated in like manner, and that therefore the sentencing

judge in making a final determination of the sentence can have no power to override it and impose death. I agree. The recommendation of the jury against death should have the force of an acquittal of the death sentence, and a recommendation that the death penalty be imposed should have the same force as a verdict of guilty.

Pursuant to the statute the jury reconvenes in court for the sentencing hearing. It is presided over by the judge. The defendant is present with his counsel and the state by its trial prosecutor. Evidence is presented in an adversarial setting. The jury receives the instruction from the court regarding the issues presented which include the question of whether an aggravating circumstance exists and whether it is of such a character as not to be outweighed by mitigating circumstances. The burden is upon the state to prove the aggravating circumstance beyond a reasonable doubt. The lawyers make final arguments to the jury. The jury retires to deliberate and returns into open court with its verdict in the form of a recommendation. This is a full scale jury trial in every sense of those terms. The defendant must surely feel that he is in "direct peril" of receiving the death penalty as he stands to receive the recommendation of the jury. *Cf., Green v. United States*, (1957) 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

The majority opinion concludes that the *Bullington* rationale does not apply to the Indiana situation because (1) the recommendation of the jury is not final and binding upon the sentencing judge, as was the case in Missouri, and (2) the recommendation does not necessarily reflect the jury's determination that the State failed in its burden to prove an aggravating circumstance. I cannot agree that these two distinctions rob the Indiana death sentencing hearing before a jury of its trial character and force. It must be evident that the jury recommendation against imposition of death will have a great and profound persuasive force in determining what choice the judge will make at final determination time. The jury recommendation must be unanimous. *Judy v. State*, (1981) Ind., 416 N.E.2d 95. It is the personal judgment of twelve adult individuals of good will selected from a list comprised of a fair cross section of the community. The judge is also a member of that same community, sharing in its life and experience. The probability is very high that the judge, upon consideration of the recommendation will be brought to the brink of agreement with it in the very nature of things. The jury recommendation against death is so much like a binding decision, that constitutional protection against a second hearing before the judge on the propriety of death should be afforded. *Cf., Breed v. Jones*, (1975) 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346.

I also cannot agree with the analysis made by the majority of the underlying bases of the jury recommendation of no death in distinguishing this case from *Bullington*. According to the Indiana statute:

"(e) The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." Ind.Code § 35-50-2-9.

According to this statute, a jury recommendation of no death would have one of two necessary characteristics. Logically, it would either be based upon the jury's determination that the State had failed to establish historical facts constituting an aggravating circumstance, or it would be based upon the jury's determination that the evidence presented had established historical facts constituting some mitigating circumstance. In either event, the judge's later procedure to decide whether the death penalty should be imposed, using "the same standards that the jury was required to consider" would result in a retrial upon the same questions of fact and any decision of the judge to override a jury recommendation of no death including as in the present case his express finding of no mitigating circumstances, would necessarily resolve

circumstance. In light of this acknowledged importance of the role of the jury, before a judge may impose a death sentence over a jury recommendation of no death sentence, that judge must articulate written findings, derived from clear and convincing evidence in the record, so that no reasonable person could differ with the determination. This standard, which has been utilized by the Supreme Court of Florida, *eg. Cannady v. State*, (1983) Fla., 427 So. 723, 732 (per curiam); *Tedder v. State*, (1975) Fla. 322 So.2d 908, 910 (per curiam), preserves the defendant's interests in having obtained a favorable jury recommendation after an adversary proceeding. *See Bullington v. Missouri*, (1981) 451 U.S. 430, 445–46, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 270, 282. Any standard of less stringency detracts from the jury's contribution to the sentencing decision as recognized by the specific legislative directive that the judge consider the jury's recommendation. Given this command, and the statement of public policy that the death penalty is only discretionary even if all the requisite standards of proof are satisfied, in the case where the jury recommends mercy, the Legislature could not have intended that the judge merely disagree in order to override that recommendation. But for mere form, the trial judge may as well have discharged the jury upon receipt of the verdict upon the issue of guilt. It is clear that he either thought that the death sentence was required by law or that it was unalterably set in his mind. Hypothetically we could not accept a statement that proclaimed: "I find that the State has proven the existence of an aggravating circumstance authorizing a sentence of death, and I find no mitigating circumstances. I further find that the defendant, by erratic conduct during the trial, may have persuaded the jury to recommend mercy—or for reasons unknown, the jury may not be capable of rendering a rational recommendation upon the sentence determination. In any event, I have determined that a sentence of death is authorized by law, warranted by the circumstances and preferred by me. A recommendation of a life sentence by the jury would not alter my decision. I, therefore, dispense with the jury hearing upon the sentencing phase of this matter, and I now order a sentence of death." From a "due process" standpoint, the hypothetical is no more repugnant than the procedure and findings actually employed in this case.

I am also concerned that the trial judge has displayed an apparent misunderstanding of the term "mitigating circumstances," as used in the statute. I am drawn to this conclusion by his statements: "As for mitigating circumstances, the Court finds none.", and, " * * * and the Court finds no mitigating circumstances to outweigh it (the aggravating circumstance)." Whether or not there were mitigating circumstances of such weight as to create a conflict in the mind of a reasonable man upon a determination of the appropriate sentence is not a matter upon which I intend to imply an opinion. However, the record is replete with unrefuted evidence of circumstances which a reasonable man could not but weigh in the balance in making a decision of such gravity. In the main, I refer to the sordid evidence of the defendant's character, a paragon of revulsion which society simply cannot tolerate unfettered. This same evidence, however, also portrays a sick, rejected and tormented creature who, although legally accountable for his loathsome and despicable conduct is, himself, a victim of forces essentially beyond his control. Whether or not he should be permitted to live by reason of these circumstances, despite his vile crime, is a matter upon which reasonable minds may differ; but human decency, the statute (any other circumstances appropriate for consideration), and due process considerations require that they be weighed in the balance. The denial of the existence of any mitigating circumstances is indicative of the trial judge's misconception of his sentencing responsibility that is likely to have resulted in grievous error.

Additionally, the judge's unbridled discretion to reweigh the evidence under the same standards considered by the jury, which action I am not convinced occurred here, potentially injects the same type of arbitrariness into the system which the Supreme Court has condemned. In cases where the judge and jury disagree, Florida's heightened standard of proof has been implicitly approved as an integral and significant factor in sustaining the constitutionality of the sentencing scheme. *Barclay v. Florida*, (1983) ——— U.S. ———, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (plurality opinion); *Dobbert v. Florida*, (1977) 432 U.S. 282, 295–96, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 344, 357–58; *Proffitt v. Florida*, (1976) 428 U.S. 242, 249, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913, 921. In light of Ind.Code § 35–50–2–9 and the above cited authorities, I am compelled to conclude that this Court's failure to impose a heightened standard of proof upon a judge who seeks to override a jury recommendation of mercy runs afoul of Federal constitutional proscriptions concerning the due process required prior to imposition of the death penalty.

III

Upon Issue No. V in the majority opinion, I believe that the appropriate standard for authentication has not been provided.

"Anyone who is familiar with a person's writing from experience, having seen him write, or having carried on correspondence with him or from the opportunities of having frequently handled and observed the person's handwriting, is competent as a non-expert to give an opinion as to the genuiness of his signature or handwriting." *Spencer v. State*, (1958) 237 Ind. 622, 626, 147 N.E.2d 581, 583. Dr. Abendroth testified that he had received three or four letters from Schiro, and he recalled some of their contents which he related to the court. He was also not equivocal about his ability to identify Defendant's handwriting nor to identify the exhibit at issue.

The majority appears to imply that, because Dr. Abendroth did not swear to knowledge of the origins of the first letters, he was not qualified to identify Defendant's handwriting. I do not understand the connection and note that in *Thomas v. State*, (1885) 103 Ind. 419, 427-29, 2 N.E. 808, 813-15, no such connection was required. Therein, though the witness produced ten letters, assertedly written by Defendant, before identifying the handwriting on the two letters, exhibits at issue, there was no testimony of how the witness knew that the accused had penned the first ten. Additionally, in this case, there is no showing that Mary Lee, whom the majority asserts could have provided the necessary authentication, did anything more than deliver the letter nor that she had any familiarity with Defendant's handwriting. Consequently, under the majority's ruling, in most cases, only the author of the letter would be able to authenticate it no matter how many times the witness, through whom a party sought to introduce the letter, had received letters from the author of the letter at issue. The law does not impose this onerous burden as the foundation for admitting a letter. *Thomas v. State, supra.*

However, the trial court has broad discretion in admitting or rejecting writings authenticated only by testimony of a witness who professes to recognize the author's handwriting. Thus, although I do not agree with the majority's conclusion that the letter was inadmissible, neither do I believe that the court committed error by rejecting it, as it was not required to accept Dr. Abendroth's testimony as a sufficiently reliable authentication.

I vote to affirm the trial court's judgment with respect to the conviction of Defendant but to vacate the death sentence and remand the case for a new sentencing hearing.

find no direct statement in the judge's records and statement of reasons quoted above for imposing the death penalty that he *personally* reached this level of certainty upon each of these elements comprising the aggravating circumstance. Quite obviously, until the point in time is reached that the judge conducts his own sentencing hearing to finally determine the sentence, he has not been called upon to make a factual determination beyond a reasonable doubt of the existence of the aggravating circumstance. The fact that the jury may have done so on some of the same elements in arriving at its verdict of guilty and in rejecting the plea of insanity as noted by the judge, cannot supplant the judge's obligation to do so. This finding of an aggravating circumstance by the sentencing judge is at the very core and heart of the final determination that death is to be imposed. The sentencing judge has not communicated to this Supreme Court Justice that he arrived at that finding at the required level of certainty. For this reason also, I cannot vote to permit his final determination to stand.

PRENTICE, J., concurs in part with concurring and dissenting opinion.

PRENTICE, Justice, concurring and dissenting.

I concur in the result reached by the majority with respect to its affirmance of the conviction of the defendant (appellant). I dissent, however, with respect to its affirmance of the sentence of death.

I.

I concur in part II of Justice DeBruler's dissenting opinion. The findings of the sentencing judge are devoid of any statement that he, himself, found, beyond a reasonable doubt from the evidence, that the defendant intentionally killed Laura Luebbehusen while committing or attempting to commit a rape upon her. I do not question that, under our standard for testing the sufficiency of the evidence upon appellate review, the evidence would have permitted such a finding, but it was not compelled. In the statement of his findings, the trial court judge correctly observed that one of the statutorily provided aggravating circumstances authorizing the imposition of a sentence of death is that the defendant committed murder by intentionally killing the victim. He proceeded to note, in particularity, that the jury had rejected Defendant's plea of insanity, and from this, he apparently concluded either that the jury had found, beyond a reasonable doubt, that the murder had been committed intentionally or that he was warranted in finding, beyond a reasonable doubt, from the jury's rejection of the insanity plea, that the murder had been committed intentionally. Neither would be correct.

Under the evidence, Defendant could have been found guilty of the crime charged whether he killed Laura Luebbehusen *intentionally* or knowingly or merely accidentally while committing or attempting to commit a rape. He was subject to the death penalty, however, only if he killed her *intentionally*. The interposition and rejection of the defense of insanity (mental disease or defect) Ind.Code § 35-41-3-6 (Burns 1979) simply has no relevance to the issue of whether or not the killing was done intentionally; yet, it is obvious that the trial court judge regarded it as significant, if not in fact controlling.

II

The trial court judge also misconstrued the statute, Ind.Code § 35–50–2–9 (Burns 1979), as a mandate to the judge to impose the death sentence in the event that an aggravating circumstance was found to exist, beyond a reasonable doubt, and that mitigating circumstances, if any, were outweighed by it. Clearly, the statute merely authorizes the imposition of the death sentence, under such circumstances.

Given the existence of one or more of the enumerated aggravating circumstances and the absence of any of the first six (6) mitigating circumstances enumerated under subsection (c) of the statute, the statute mandates neither a recommendation of death by the jury nor the imposition of the death penalty by the judge. Subsection (e) provides that the standards employed by the jury and those employed by the judge be the same, and the seventh (7th) enumerated mitigating circumstance is entirely subjective, i.e., "(7) Any other circumstances appropriate for consideration." It permits unbridled discretion to spare defendants from the supreme penalty.

The majority has said, "The language of the trial court may appear awkward but nowhere has the trial court * * * attempted to apply anything resembling a mandatory death penalty." I emphatically disagree with this statement. The statement of the trial judge, for the most part, was a recitation of the death sentence statute and certain evidence supportive of the sentence. There is nothing contained in the statement of the trial judge, however, that acknowledges that it is he who has determined that the defendant should die. There is nothing contained in the statement to indicate that he understood that it was his burden, under the law, to determine whether the defendant should live or die. Rather, the entire tenor of the findings that closed with the statements, " * * * the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.", reflects that the judge regarded himself as a mere conduit who had the unpleasant ministerial duty to announce a sentence fixed by statute.

The trial judge's comments amply demonstrate his misunderstanding of the standard he was required to apply in reaching the sentencing decision. Ind.Code § 35–50–2–9 affirmatively mandates the judge to employ the same standards that the jury was required to consider. That standard is stated as follows:

"The jury *may* recommend the death penalty only if it finds: * * *."

In *Hoskins v. State*, (1982) Ind., 441 N.E.2d 415, 430 (Prentice, J., joined by Hunter, J., concurring) I noted that this standard does not require the imposition of the death penalty under any circumstances whatsoever and that, "It is not altogether illogical to conclude, therefore, that although a juror finds facts warranting the death penalty and no mitigating circumstances whatsoever, he *may*, nevertheless, recommend against imposing it without violating his oath." Similarly, the trial judge may refrain from imposing a sentence of death even though its imposition could not be held to be unreasonable under the circumstances. Moreover, it appears from the context of the judge's comments that, had he believed he had a choice, which he in fact did have under the statute, he would not have sentenced Defendant to death. The record reveals that the death sentence was imposed upon an erroneous standard. Consequently, the matter should be remanded for a new sentencing hearing. *State v. Watson*, (1982) La., 423 So.2d 1130, 1134–36.

In addition to being convinced that the sentence was imposed upon an erroneous standard, I am also convinced that the provisions of Ind.Code § 35–50–2–9, read in conjunction with Federal Due Process requirements concerning capital punishment, require the judge to give considerable weight to the jury's recommendation of mercy and this Court to review a death sentence, imposed contrary to the recommendation of the jury, upon a standard higher than a mere search for *manifest unreasonableness* as currently required under Ind.R.App.Rev.Sen. 2.

The nunc pro tunc order of February 23, 1983 does not state how the jury's recommendation was considered nor how much weight it was given by the judge.

The United States Supreme Court considers the jury "a significant and reliable objective index of contemporary values" with respect to the imposition of the death penalty. *Gregg v. Georgia*, (1976) 428 U.S. 153, 181, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859, 879 (plurality opinion of Stewart, J.). *Accord Brewer v. State*, (1981) Ind., 417 N.E.2d 889, 909. Our Legislature echoed these sentiments when it mandated the trial court to consider the jury's recommendation, Ind.Code § 35–50–2–9(e), and by allowing the jury to consider "any other circumstances appropriate for consideration." Ind.Code § 35–50–2–9(c)(7), as a mitigating

biased as to make sentencing determination arbitrary or capricious.

10. Criminal Law ⇐1144.10

In addressing issue of competency of counsel, Supreme Court indulges strong presumption that counsel's conduct falls within wide range of reasonable professional assistance.

11. Criminal Law ⇐641.13(1)

Under "performance component" of test employed in addressing issue of competency of counsel, defendant must show that counsel's alleged acts or omissions fell outside of wide range of reasonable professional assistance; if defendant satisfies that step, he must then establish under "prejudice component" that counsel's errors had adverse effect upon judgment.

12. Criminal Law ⇐641.13(1)

In applying two-step test employed in addressing issue of competency of counsel, it is not necessary to address both components if defendant makes insufficient showing as to one.

13. Criminal Law ⇐641.13(2)

Instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms for "guilty of murder while committing and attempting to commit rape but mentally ill" and "guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill," and thus, defendant was unable to establish that his trial counsel's failure to assure that jury received all necessary verdict forms had adverse effect on judgment. U.S.C.A. Const.Amend. 6.

Susan K. Carpenter, Public Defender, Frances Watson Hardy, Deputy Public Defender, Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Chief Justice.

Appellant was convicted by a jury of Murder While Committing or Attempting to Commit Rape. The trial court sentenced appellant to death. The conviction and death sentence were affirmed by this Court on direct appeal. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047 (DeBruler, J., and Prentice, J., dissenting as to sentence), *cert. denied*, — U.S. —, 104 S.Ct. 510, 78 L.Ed.2d 699. Appellant's Petition for Post-Conviction Relief was denied. He now appeals.

The facts of this case were set out at length in the opinion on direct appeal. *Schiro, supra* at 1049–50. They will not be repeated here.

Appellant raises two issues in this appeal: whether the post-conviction court erred in finding the death penalty was proper in light of his allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination; and whether the post-conviction court erred in finding appellant was not denied effective assistance of counsel.

[1, 2] In reviewing the denial of a post-conviction petition, this Court does not weigh evidence nor judge the credibility of witnesses. *Owens v. State* (1984), Ind., 464 N.E.2d 1277. The petitioner must satisfy this Court that the evidence as a whole leads unmistakably to a decision in his favor. *Bean v. State* (1984), Ind., 467 N.E.2d 671.

Appellant's first issue is divided into four subissues. In the first three subissues, which address the trial court's consideration of his behavior during the trial, appellant alleges: 1) that the information could not be relied upon because it was not introduced into evidence; 2) that because he did not testify, reliance on observations of his behavior violated his Fifth Amendment rights; and 3) that he was denied his right to effective assistance of counsel because defense counsel was not afforded an opportunity to comment on facts influencing the sentencing decision. The fourth subissue concerns a comment made by the trial judge which appellant argues demonstrates the judge was biased and therefore unable to objectively render the sentencing determination.

Upon review of appellant's direct appeal, this Court found the trial court's original findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro, supra* at 1056. We ordered the court to make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind. Code § 35-50-2-9. *Id.* In its *nunc pro tunc* entry the court found that the aggravating circumstance set out in Ind.Code § 35-50-2-9(b)(1) was proved beyond a reasonable doubt.

The court then stated that it found no mitigating circumstances, and addressed each of the possible mitigating circumstances delineated in Ind.Code § 35-50-2-9. In reference to the statutory mitigating circumstances concerning a defendant's mental or emotional condition, subsection (6)(2), and impairment of a defendant's capacity to appreciate the criminality of his conduct, subsection (c)(6), the court made the following finding:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

Appellant contends this finding constitutes the court's primary basis for sentencing him to death after the jury had recommended the death penalty not be imposed. He argues that "obviously" the court based its death penalty judgment on its observations, representing an "absolute denial of due process."

[3] We cannot agree with appellant's conclusory assertion that the court based its judgment on observations of his behavior. The court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt. *Schiro, supra* at 1058. It addressed each of the possible mitigating circumstances delineated in the statute. Regarding appellant's mental state, the court made additional findings which cited testimony by psychiatric experts and evidence of appellant's attempt to conceal his crime. *Id.* at 1059. While the court's observations were certainly germane to its consideration of the jury's recommendation, it cannot be said its finding that appellant may have misled the jury constituted the basis for imposition of the death penalty.

[4, 5] Neither can we agree with appellant's contention that consideration of his behavior was impermissible because it was information not admitted into evidence. It is axiomatic that a trial court, within its discretion, can consider a defendant's behavior in the courtroom, regardless of whether the jury is present. The court can properly consider such "non-evidentiary" information as the pre-sentence investigation report and its perception of a defendant's remorse or lack thereof. We find no authority to support the conclusion appellant would have us draw, that a judge in a capital case is precluded from considering a defendant's behavior during the course of the trial if evidence of such behavior is not admitted into evidence.

Appellant nevertheless argues that under *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, the death penalty is invalid. In that case a Florida jury recommended a life sentence. The trial judge, as in the instant case, overrode the jury's recommendation and sentenced the defendant to death. In imposing the death penalty the judge stated that his decision was based in part on a presentence report which contained a confidential portion not available to the defense.

counsel was inadequate because he did not submit such an instruction.

In deciding whether to give a lesser included offense instruction, the trial court applies the following test:

"In determining whether to instruct the jury that they may return verdicts on lesser-included offenses, the trial court must apply a two-part test. First, by examining the statutes defining greater and lesser-included offenses, and the charging instrument, the court determines whether the lesser-included offenses to be instructed are inherently included in the greater charge, or 'factually' included in the charging instrument's allegations of the means by which the greater crime allegedly was committed. Second, the court must make a determination of whether, assuming that an offense was committed, the evidence would, *prima facie*, warrant a conviction for a lesser-included offense, or could only warrant a conviction for the principal charge, in which case the lesser-included offense instructions should not be given." (citations omitted.)

Henning v. State (1985), Ind., 477 N.E.2d 547, 550–551. In this case the evidence conclusively demonstrated that Officer Bauner obtained phencyclidine from someone. The issue at trial was whether or not he obtained phencyclidine from the Defendant. Thus, there is no question that a transaction involving phencyclidine did occur. An instruction that the jury could convict Defendant of the lesser offense of "possession," thus, would not have been warranted under the evidence, would have invited a compromise verdict, and would properly have been refused. Defendant has demonstrated no error by counsel in failing to submit such instructions.

[9, 10] Finally, Defendant presents a general attack upon trial counsel's performance, arguing in particular that he should have called character witnesses or presented other evidence on Defendant's behalf. However, before a claim of ineffective assistance of counsel can be premised upon his failure to present evidence, it must be shown that such evidence existed and was reasonably available. Defendant's claim of ineffective assistance of counsel is not borne out by the inaction cited.

We find no error, hence the judgment of the trial court is affirmed.

GIVAN, C.J., and DeBRULER and PIVARNIK, JJ., concur.

HUNTER, J., not participating.

Thomas N. SCHIRO, Appellant,

v.

STATE of Indiana, Appellee.

No. 1084S423.

Supreme Court of Indiana.

June 28, 1985.

Rehearing Denied Sept. 4, 1985.

Defendant, petitioned for postconviction relief. The Circuit Court, Brown County, James M. Dixon, J., denied the petition. Defendant appealed. The Supreme Court, Givan, C.J., held that: (1) trial judge's finding that defendant might have misled jury by his continual rocking motions during trial did not constitute basis for imposition of death penalty, (2) defendant had opportunity to challenge trial judge's observations regarding his conduct so that defendant's due process rights were not violated, (3) the trial judge's observations regarding defendant's conduct were not directed toward defendant's exercise of his constitutional rights, (4) defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain, (5) judge's remark regarding whether defendant was going to live or die was insufficient evidence from which to conclude that judge was so biased as to make sentencing determination arbitrary or capricious, and (6) instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms.

Affirmed.

DeBruler, J., dissented and filed an opinion.

1. Criminal Law ⇐1158(1)

In reviewing denial of postconviction petition, Supreme Court does not weigh evidence or judge credibility of witnesses.

2. Criminal Law ⇐1158(1)

On review of denial of postconviction petition, petitioner must satisfy Supreme Court that evidence as whole leads unmistakably to decision in his favor.

3. Criminal Law ⇐1208.1(4)

Although trial judge's observations of defendant's behavior during course of trial were germane to his consideration of jury's recommendation that death penalty not be imposed, trial judge's finding that defendant might have misled jury by his continual rocking motions during trial when jury was present, but which did not occur when defendant was out of jury's presence, did not constitute basis for imposition of death penalty.

4. Criminal Law ⇐1208.1(4)

Trial court, within its discretion, can consider defendant's behavior in courtroom regardless of whether jury is present and thus judge in capital case is not precluded from considering defendant's behavior during course of trial even if evidence of such behavior is not admitted into evidence.

5. Criminal Law ⇐986.2(6), 986.4(1)

Trial court can properly consider such "non-evidentiary" information as presentence investigation report and its perception of defendant's remorse or lack thereof.

6. Constitutional Law ⇐270(2)

Defendant's due process rights were not violated under theory that death sentence was imposed on basis of information which defendant had no opportunity to deny or explain where, at sentencing hearing, judge expressly stated his observations of defendant's behavior and its relevance to sentencing determination, and thus defendant had opportunity to challenge observations and judge's conclusions based thereon, and where testimony was introduced to trial by both sides in reference to defendant's prior rocking behavior so that defense counsel could have presented additional evidence at sentencing hearing pertaining to statutory mitigating circumstances. IC 35-50-2-9(d)(1982 Ed.); U.S.C.A. Const. Amends. 5, 14.

7. Criminal Law ⇐393(1)

Trial judge's observations about defendant's rocking motions during trial were directed toward possible mitigating factors and jury's recommendation that death penalty not be imposed, not to defendant's exercising of his constitutional rights, and thus, trial court's consideration of defendant's behavior did not violate his right against self-incrimination. IC 35-50-2-9(d) (1982 Ed.); Const. Art. 1, § 14; U.S.C.A. Const.Amend. 5.

8. Criminal Law ⇐641.13(7)

Defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain where, at sentencing hearing, trial judge specifically stated his observations of defendant's behavior and jury's presence and relevance of those observations to sentencing determination so that counsel had opportunity to contemporaneously object to or rebut judge's observations. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐655(1)

Judge's remark regarding whether defendant was going to live or die, made in emotionally charged atmosphere preceding return of verdict, was insufficient evidence from which to conclude that judge was so

[12, 13] In applying the aforementioned two-step test, it is not necessary to address both components if the defendant makes an insufficient showing as to one. *Richardson, supra* at 501 (citation omitted). Because the instruction regarding the encompassing applicability of the guilty but mentally ill verdicts cured the potentially prejudicial impact of the omission of the verdict forms, appellant is unable to establish that counsel's omission had an adverse effect upon the judgment. The post-conviction court did not err in finding that appellant was not denied effective assistance of counsel.

The trial court is in all things affirmed.

PRENTICE and PIVARNIK, JJ., concur.

DeBRULER, J., dissents with separate opinion.

HUNTER, J., not participating.

DeBRULER, Justice, dissenting.

Petitioner-appellant was convicted of murder and sentenced to death. When the trial judge imposed the death sentence on October 2, 1981, he stated that he was relying in part on his personal observations of appellant's conduct in the Court's outer chambers, during the trial on the question of guilt or innocence, when the jury was not present. The trial judge had not previously disclosed to counsel for the parties that he had made those observations and that he would rely upon them in making the life or death decision. Thus, the decision itself was arrived at before counsel knew of this unique basis and had all opportunity to respond to it. This procedure does not satisfy the constitutional requirement of the due process of law.

In the aforementioned statement the judge said:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

This is the justification of the judge's rejection of the jury's recommendation of life. By this revelation, the judge discloses that he deemed himself by reason of his observations, to be in a better position than the jury to make the life-death decision. I believe this was error.

In *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 the sentencing judge indicated that he selected death in part because of information contained in a presentence report, which information had not been disclosed to the defendant or his counsel and to which the defendant had no opportunity to respond. The U.S. Supreme Court set the sentence aside. Here, the opportunity to respond to Judge Rosen's statement did not arise until after he had made and formally announced his decision to override the jury recommendation of life and impose death.

The standards of due process are flexible and dictated by the circumstances and competing interests involved. A hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. The interests of the defendant and the state in an accurate ascertainment of facts upon which a sentence of death may be given, are at the highest level. We are bound to adopt and adhere to procedures which insure against the arbitrary deprivation of life.

In these circumstances, the opportunity to respond to the factual information supplied by the judge's private observations, came after that factual information was used and the life or death decision was reached. This opportunity was not meaningful in time. The opportunity to respond was restricted to a request to reconsider a decision which had already been reached and publicly announced. Much judicial time and energy had already been invested in arriving at that decision. One need only compare the process of reaching a decision with the process of retreating from a decision, to appreciate the reality of the restriction resulting from the procedure employed here. In sum, to permit the personal observations of the judge, this new matter, to be swept in at the last moment, without prior notice, and to be used as a critical part of the basis for the sentencing court's decision, is contrary to my sense of fairness.

Jerry Lee STOUT, Appellant (Defendant Below),

v.

STATE of Indiana, Appellee (Plaintiff Below).

No. 782 S 259.

Supreme Court of Indiana.

July 1, 1985.

Defendant was convicted in the Circuit Court, Jennings County, Larry J. Greathouse, J., of burglary and theft, and he appealed. The Supreme Court, Prentice, J., held that: (1) error in giving instruction on flight as evidence of guilt was harmless; (2) photographs of recovered stolen items were admissible; (3) testimony of accomplice as to defendant's participation in prior crimes was admissible; (4) police officer could testify regarding statements of third parties which caused him to take certain action; (5) theft of items from victim's home and of automobile from victim's garage constituted only single theft offense; and (6) consecutive sentences were warranted.

Affirmed in part, vacated in part, and remanded.

Pivarnik, J., concurred in part and dissented in part.

1. Criminal Law ⇐814(12), 1172.6

Trial court should not have given jury instruction on flight as evidence of guilt, in light of uncontradicted evidence showing that defendant surrendered to police and did not attempt to flee; error was harmless, however, in light of direct testimony of accomplice and ample physical evidence linking defendant to crime.

2. Searches and Seizures ⇐7(26)

Whether nonowner may challenge constitutional validity of search depends on whether he has legitimate expectation of privacy in place searched, which is fact question to be determined on case-by-case basis. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(26)

Frequent guest at premises he does not own has no legitimate expectation of privacy in premises, so as to give him standing to challenge constitutionality of search, unless he produces other evidence to show that he maintains degree of control over premises. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐7(26)

Evidence that defendant stayed at residence of his girlfriend "once in a while" was insufficient to establish his legitimate expectation of privacy in residence sufficient to give him standing to challenge constitutionality of its search; defendant made no showing that he had any degree of control over residence or any part therein. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐444

Victim's identification of photographs as pictures of items similar to those taken from his home was sufficient to establish relevancy and materiality of photographs in burglary prosecution; fact that victim

Id. at 353, 97 S.Ct. at 1202, 51 L.Ed.2d at 398-99.

The United States Supreme Court vacated the death sentence. The Court concluded the petitioner was denied due process because the death sentence was imposed, at least in part, on the basis of information which the petitioner had no opportunity to deny or explain. *Id.* at 362, 97 S.Ct. at 1207, 51 L.Ed.2d at 404. The Court found that because the confidential portion of the report was not part of the record on appeal, the Florida Supreme Court was unable to consider "the total record" in its review. *Id.* at 361, 97 S.Ct. at 1206, 51 L.Ed.2d at 404.

[6] The instant case is distinguishable. At the sentencing hearing the judge expressly stated his observations of appellant's behavior and its relevance to the sentencing determination. Appellant thus had an opportunity to challenge the observations, and the judge's conclusion based thereon, either contemporaneously or upon filing his motion to correct error. Further, this Court explicitly considered the controverted finding on review of appellant's direct appeal. *Schiro, supra* at 1057, 1059.

We also note that testimony was introduced at trial by both sides in reference to appellant's prior rocking behavior. Appellant introduced testimony that he rocked in the presence of witnesses. Despite appellant's contention of lack of notice of the court's conclusion based on such behavior, defense counsel, who was certainly aware of the continual rocking motions referred to by the court, could have presented additional evidence at the sentencing hearing pertaining to the statutory mitigating circumstances. *See* Ind.Code § 35-50-2-9(d). The due process violation found in *Gardner, supra* is not present here.

Appellant contends that because under the Fifth Amendment of the United States Constitution and Art. 1, § 14 of the Indiana Constitution the general trial demeanor and manner of a defendant who does not take the stand cannot be considered against him and no inference can be drawn from his failure to testify, the trial court's consideration of his behavior violates his right against self-incrimination.

[7] This argument is without merit. The sole case cited by appellant, *People v. Ramirez* (1983), 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31, is inapposite to the circumstances of the instant case. In *Ramirez* the State's attorney commented to the sentencing jury that the defendant had "sat silent" and offered no explanation for the crime. The Supreme Court of Illinois' decision to vacate the death sentence was based on the prosecutor's comment and the trial judge's refusal to properly instruct the jury not to consider the defendant's decision not to testify at the sentencing hearing. *Id.* at 472-73, 457 N.E.2d at 47.

Although the impermissible comment in *Ramirez* was couched in terms of the defendant's "conduct", the crux of the constitutional violation was the impropriety of commenting on the defendant's decision not to testify. Here, the trial judge's observations were directed to two of the possible mitigating factors and to the jury's recommendation, not to appellant's exercising of his constitutional rights. The record does not reveal any comment by the prosecution or by the court made in reference to appellant's decision not to testify at the sentencing hearing.

In an argument related to his contention that the trial court erred in considering non-evidentiary information, appellant asserts he was denied his Sixth Amendment right to effective representation upon the sentence being based on information which he had no opportunity to deny or explain.

[8] This argument is also without merit. At the sentencing hearing the trial judge specifically stated his observations and their relevance to the sentencing determination. Counsel thus had the opportunity to contemporaneously object to or rebut the judge's observations. As the finding was stated explicitly and openly, we cannot conclude that the court's reference to its observations of appellant's demeanor precluded defense counsel from commenting on facts influencing the sentencing decision. *See Gardner, supra*, 430 U.S. at 360, 97 S.Ct. at 1206, 51 L.Ed.2d at 403.

In his fourth subissue appellant alleges the trial judge was biased. This allegation is premised on a comment made by the judge to a newspaper reporter which appellant argues supports the conclusion the judge had predetermined that the death penalty would be imposed.

The newspaper reporter, Jocelyn Winnecke of the *Evansville Sunday Courier and Press*, testified at the post-conviction hearing that the judge, The Honorable Samuel R. Rosen, remarked to her after the guilty verdict was returned that "we're going to fry the boy." Judge Rosen testified that before entering the courtroom to receive the guilty verdict he said "soon we'll know whether he'll live or die." Judge Rosen also testified that he would never use the word "fry" in that context and that he did not make up his mind until the date of sentencing whether the death penalty would be imposed. Vanderburgh County Deputy Prosecutor Jerry Atkinson, who prosecuted the case, was privy to the conversation between Winnecke and Judge Rosen. His recollection at the hearing was that Judge Rosen stated "I think the boy is going to die."

[9] Appellant argues that the judge's statement, coupled with the judge's reliance on his personal observations, conclusively reflects bias and a predetermination of the death sentence. As stated *infra*, the observations were properly relied upon by the judge and in no way represent a loss of objectivity. The comment made by Judge Rosen, in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious. The post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge.

Appellant also alleges he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to assure that the jury received all the necessary verdict forms.

[10, 11] In addressing the issue of competency of counsel, this Court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Bailey v. State* (1985), Ind., 472 N.E.2d 1260; *Elliott v. State* (1984), Ind., 465 N.E.2d 707. We apply a two-step test comprised of a "performance component" and a "prejudice component". Under the first step, a defendant must show counsel's alleged acts or omissions fell outside the wide range of reasonable professional assistance. If the defendant satisfies the first step of the test, he must then establish that counsel's errors had an adverse effect upon the judgment. *Richardson v. State* (1985), Ind., 476 N.E.2d 497; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

Trial counsel did not submit verdict forms for the offenses of guilty of murder while committing and attempting to commit rape but mentally ill and guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill. *Schiro, supra* at 1062. Appellant contends that because the jury returned a felony murder guilty verdict on a count for which they were not supplied with a guilty but mentally ill verdict form confidence in the outcome of his trial was undermined.

This issue was raised in appellant's direct appeal in the context of trial court error in failing to supply the jury with all the necessary verdict forms. *Id.* We determined that appellant's Instruction No. 2, which informed the jury that the possible verdict of guilty but mentally ill was submitted to them on all counts of the information, sufficiently informed the jury that the mentally ill verdict "applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder." *Id.* at 1063. As appellant failed to show any prejudice, there was no reversible error on that issue. *Id.*

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was so prejudicial as to have deprived him of fair trial. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐998(8)

For purpose of rule that postconviction relief petitioner alleging ineffectiveness of counsel must prove that substandard performance was so prejudicial as to have deprived him of fair trial, fair trial is denied when conviction or sentence resulted from breakdown in adversarial process which rendered result unreliable. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐998(3)

Item is waived for postconviction review, where item was available to defendant on direct appeal but not pursued.

4. Judgment ⇐751

Issue previously raised and determined adverse to postconviction relief petitioner's position is res judicata.

5. Judgment ⇐751

Postconviction relief petitioner's allegations that statute failed to provide guidelines for consideration of jury's recommendation and for appellate review of sentences, and that error was committed in admitting search warrant, affidavit, and physical items, in excluding handwritten document, and in providing verdict forms, were res judicata due to defendant's direct appeal of conviction.

6. Criminal Law ⇐998(16)

Postconviction relief petitioner alleging ineffectiveness of counsel must overcome heavy strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(1)

Isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

8. Criminal Law ⇐641.13(6)

Failure of defense counsel to pursue leads, assuming arguendo that prisoner did bring those matters to counsel's attention, did not constitute ineffective assistance of counsel, prisoner claimed that there was evidence that victim consented to sexual encounters and that evidence could have been proven by checking with bartenders and clerks at bars, but prisoner never gave names of establishments he and victim allegedly visited or identified anyone in those establishments who could verify story, and allegedly coerced testimony of prisoner's girl friend as to alleged admissions to her by prisoner recounted nothing which prisoner did not tell others in his confession. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(2)

Failure of defense counsel to request sequestration of jury did not constitute ineffective assistance of counsel; news reports on trial presented by prisoner were all subsequent to jury's final recommendation and judge's final sentence, and prisoner did not present any evidence that any juror ignored judge's instructions or became exposed to any outside influence from individuals or media sources. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(7)

Prisoner did not receive ineffective assistance of counsel on basis that counsel did not present adequate mitigation evidence after conviction; significant mitigating evidence was presented in guilt phase in which insanity defense was raised, thereby bringing into issue matters of character, background, and history that are normally reserved for penalty phase, and mitigating evidence was argued by counsel in penalty phase. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐998(21)

Prisoner waived issue of ineffective appellate representation in second post conviction petition by raising issue in original postconviction petition. U.S.C.A. Const. Amend. 6.

12. Criminal Law ⇐1077.3

Appellate counsel need not raise issue on appeal that in his professional judgment appears frivolous or unavailing.

13. Criminal Law ⇐641.13(6)

Defense counsel's alleged failure to effectively cross-examine State's rebuttal witness who detailed armed sexual assault which prisoner perpetrated against her, and failure to object to array of photos from which she picked prisoner as her assailant, did not constitute ineffective assistance of counsel; there was no showing as to what information might have been gained by further cross-examination of witness, and witness' testimony did no more than repeat one instance of as many as 23 instances of other unrelated sexual assaults prisoner committed which he himself related in statement. U.S.C.A. Const. Amend. 6.

14. Criminal Law ⇐641.13(2)

Defense counsel's failure to respond to prisoner's family's assertion that psychiatric witness tried to "shake him down" for extra fee as condition for most favorable testimony did not constitute ineffective assistance of counsel; assertion rested on multiple hearsay attributed by prisoner to his parents, facts of alleged "shakedown" were not shown in evidence, and prisoner's parents never testified or told anyone else that incident occurred. U.S.C.A. Const. Amend. 6.

15. Criminal Law ⇐199

For purpose of double jeopardy rule that conviction of lesser-included offense is acquittal for greater offense, aggravating circumstance is not "offense." U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

16. Homicide ⇐235

One can be found guilty of felony-murder, where intention was to commit underlying felony, without necessarily intending to commit murder. IC 35-42-1-1(2) (1988 Ed.).

17. Homicide ⇐357(3)

One convicted of felony-murder may also be shown to have intentionally killed victim while perpetrating felony as aggravating circumstances. IC 35-42-1-1(2) (1988 Ed.).

18. Indictment and Information ⇐109(8)

Crimes of murder and felony-murder each contain elements different from the other, but are equal in rank, and one is not included offense of other. IC 35-42-1-1(1, 2) (1988 Ed.).

19. Homicide ⇐315

Jury verdict finding defendant charged with both murder and felony-murder guilty of only felony murder, does not operate as acquittal of elements of murder jury chose not to consider. IC 35-42-1-1(1, 2) (1988 Ed.).

20. Homicide ⇐315, 357(3)

Jury verdict finding defendant guilty of felony-murder, but which remained silent on charge of murder by knowingly killing, did not preclude trial court from considering aggravating circumstance of intentional killing victim while committing or attempting to commit rape and criminal deviate conduct for purpose of imposing death penalty; finding of guilty on felony-murder charge was not conclusive finding of lack of intent to murder. IC 35-42-1-1(1, 2) (1988 Ed.).

Alex R. Voils, Jr., Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for appellee.

PIVARNIK, Justice.

This direct appeal arises from a denial of post-conviction relief. The history of this cause in this court is extensive. On September 12, 1981, Defendant Schiro was found guilty of the offense of murder while committing, and attempting to commit, the crime of rape. The trial court entered judgment of conviction on the jury's verdict. The jury recommended that the death penalty not be imposed but the trial court overruled that recommendation and ordered the death sentence for Schiro. This court affirmed the trial court's judgment. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047. On November 28, 1983, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death penalty. *Schiro v. Indiana* (1983), 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699. On May 11, 1984, Schiro filed an amended petition for

Edwin Paul BAUM, Appellant,

v.

STATE of Indiana, Appellee.

No. 29S00-8801-PC-57.

Supreme Court of Indiana.

Feb. 7, 1989.

Petitioner filed second postconviction relief petition alleging ineffective assistance of counsel at trial and at first postconviction relief proceeding. The Hamilton Superior Court No. 1, Donald E. Foulke, J., denied petition, and petitioner appealed. The Supreme Court, Givan, J., held that: (1) petition presenting a collateral attack upon prior court judgment denying petition for postconviction relief alleging defective performance of counsel at prior postconviction hearing posed no cognizable grounds for postconviction relief, and (2) right to counsel in postconviction proceedings is guaranteed by neither the United States nor State Constitution.

Affirmed.

1. Criminal Law ⇐998(21)

Petition collaterally attacking prior court judgment denying petition for postconviction relief alleging defective performance of counsel at prior postconviction hearing posed no cognizable grounds for postconviction relief, and therefore was subject to denial without a hearing. Post Conviction Rule 1, §§ 1, 4(e).

2. Criminal Law ⇐998(21)

If convicted person wishes to challenge performance of his defense counsel at trial upon criminal charges, he may do so, and if such challenge is included in second petition for postconviction relief, claim is properly subject to waiver or res judicata.

3. Criminal Law ⇐998(20)

Right to counsel in postconviction proceedings is guaranteed by neither the United States nor State Constitution. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 13.

4. Criminal Law ⇐998(20)

If counsel, on petition for postconviction relief, in fact appeared and represented petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standards set forth in *Strickland v. Washington*. U.S.C.A. Const.Amend. 6.

Gerald M. DeWeese, Noblesville, for appellant.

Linley E. Pearson, Atty. Gen., Michael Gene Worden, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Judge.

This is an appeal from the denial of appellant's second post-conviction relief petition. In 1975, appellant was tried before a jury on a charge of First Degree Murder. He was found guilty of Second Degree Murder and sentenced to life imprisonment. We affirmed his conviction on direct appeal *Baum v. State* (1976), 264 Ind. 421, 345 N.E.2d 831. Later in 1976, appellant filed his first petition for post-conviction relief, which was denied after a hearing in 1977. We affirmed that denial in *Baum v. State* (1978), 269 Ind. 176, 379 N.E.2d 437. Appellant filed his second post-conviction relief petition in 1986, alleging ineffective assistance of counsel at his trial and at his first post-conviction relief proceeding. After a hearing in 1987, the trial court denied the petition, resulting in the instant appeal.

Appellant contends the trial court erred in denying his second petition for post-conviction relief by finding he was not denied effective assistance of counsel for his first petition.

[1, 2] Under Ind.R.P.C.R. 1, § 1, a petitioner is authorized to challenge his conviction and sentence. Appellant's petition does not do this. Instead he presents a collateral attack upon a prior court judgment denying post-conviction relief. His collateral attack alleges defective performance of counsel at a prior post-conviction hearing. The petition poses no cognizable grounds for post-conviction relief, and is

therefore was subject to being denied without a hearing per Ind.R.P.C.R. 1, § 4(e). If a convicted person wishes to challenge the performance of his defense counsel at a trial upon criminal charges, he may do so. If such challenge is included in the second petition for post-conviction relief, the claim then is properly subject to waiver or *res judicata*. *Tillman v. State* (1987), Ind., 511 N.E.2d 447.

Appellant's attempt in this instance should not receive sanction because it results in an avoidance of legitimate defenses and thus constitutes an abuse of the post-conviction remedy. Any determination of merit of appellant's claim would require creation of legal standards to be applied when judging the performance of counsel in prosecuting a petition under Ind.R.P.C.R. 1. All of appellant's assertions in his petition, which resulted in the judgment challenged in this appeal, are made to demonstrate that his counsel's performance in prosecuting his first petition for post-conviction relief was defective.

[3] The right to counsel in post-conviction proceedings is guaranteed by neither the Sixth Amendment of the United States Constitution nor art. 1, § 13 of the Constitution of Indiana. A petition for post-conviction relief is not generally regarded as a criminal proceeding and does not call for a public trial within the meaning of these constitutional provisions. *Carman v. State* (1935), 208 Ind. 297, 196 N.E. 78. It thus is not required that the constitutional standards be employed when judging the performance of counsel when prosecuting a post-conviction petition at the trial level or at the appellate level.

[4] We therefore apply a lesser standard responsive more to the due course of law or due process of law principles which are at the heart of the civil post-conviction remedy. We adopt the standard that if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standard set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

The post-conviction court is affirmed.

SHEPARD, C.J., and DeBRULER, PIVARNIK and DICKSON, JJ., concur.

Thomas N. SCHIRO, Appellant (Defendant below),

v.

STATE of Indiana, Appellee (Plaintiff below).

No. 07S00-8807-PC-656.

Supreme Court of Indiana.

Feb. 8, 1989.

Prisoner previously convicted of murder while committing and attempting to commit crime of rape filed second postconviction relief petition. The Brown County Circuit Court, John Baker, Special Judge, denied petition, and prisoner appealed. The Supreme Court, Pivarnik, J., held that: (1) issues raised regarding error at trial were res judicata due to prisoner's direct appeal of conviction; (2) prisoner did not receive ineffective assistance of counsel; and (3) aggravating circumstance of intentional killing could be considered at penalty phase of trial.

Affirmed.

DeBruler, J., filed dissenting opinion in which Dickson, J., concurred.

1. Criminal Law ⇐998(8)

To prevail on claim of ineffectiveness of counsel, postconviction relief petitioner must prove counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that such substandard performance

show he was denied a fair trial when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699; *Lawrence*, 464 N.E.2d at 1294. To meet this burden, a petitioner must overcome by strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. *Williams v. State* (1987), Ind., 508 N.E.2d 1264, 1266–67. The question is factually oriented. This court does not speculate about what may have been the most advantageous strategy. Isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. *McChristian v. State* (1987), Ind., 511 N.E.2d 297, 300.

(A)

[8] In the second PC hearing, Schiro claims he told his counsel facts which should have been used in his defense but were not. He claimed there was evidence the victim consented to the sexual encounters and this could have been proven by checking with bartenders and clerks at bars. He further claimed Mary Lee, his girlfriend, told him she was coerced into her testimony which included his admission to, and description of, the crimes committed upon her. However, Schiro never gave the names of the establishments he and the victim allegedly visited, or identified anyone in any of those establishments who could verify his story. Further, Mary Lee appeared as a witness attempting to help him. She recounted nothing of what Schiro told her which he had not himself told other psychiatric expert witnesses in a thirty-page confession that was referred to as an "autobiography."

Schiro claimed insanity as his defense at trial. The claims he presently makes regarding the probative value of the evidence he allegedly gave his lawyer, are totally inconsistent with the insanity defense and all other evidence in the case. Psychiatric testimony at trial showed that Schiro was a manipulative and incredible individual; the trial court was therefore justified in treating his assertions as questionable and unsubstantiated. There was ample evidence justifying the trial court's deciding the credibility issue, and we find no reason to disturb it. Furthermore, even if we assume *arguendo* that Schiro did bring these matters to his counsel's attention, it was a rational strategy decision to not develop two unpromising and essentially useless leads which could be more damaging than helpful to Schiro.

(B)

[9] Schiro also claims ineffective assistance in counsel's failure to sequester the jury. Counsel was under no duty to request sequestration in a capital case and petitioner must show prejudice by failure to move for it. *Burris v. State* (1984), Ind., 465 N.E.2d 171, 193, *cert. denied*, 469 U.S. 1132, 105 S.Ct. 816, 83 L.Ed.2d 809. To support his contention, Schiro presented a few newspaper clippings showing regional newspapers reported the trial. Included were articles about the jury's final recommendation and the judge's final sentence. Though these reports obviously did not affect the jury during its deliberations. He located seven jurors but did not present any evidence that any juror ignored the judge's instructions or became exposed to any outside influence from individuals or media sources. Because he failed in his burden of proof to show prejudice, we must find the trial court correctly rejected the contention of ineffective representation of counsel.

(C)

[10] Schiro claims counsel did not present an adequate mitigation defense after the penalty phase conviction. The PCR court found Schiro failed to prove counsel's decision was unreasonable or prejudicial. The court's findings of fact noted significant mitigating evidence was presented at the guilt phase of the trial and was argued by counsel in the penalty phase. Schiro raised the insanity defense, thereby bringing into issue at the guilt phase all those matters of character, background, and history that normally are reserved for the

penalty phase. It is a defensible strategic decision to use all this evidence at the guilt phase to try to obtain an acquittal and not reintroduce all the same evidence at the penalty phase. The trial court was justified in finding counsel's performance in this area did not depart from reasonable norms of representation, and therefore no prejudice was shown.

(D)

[11, 12] Schiro also identifies seven issues he claims were preserved for appeal but not presented by appellate counsel. This issue of ineffective appellate representation was available for presentation in the original post-conviction petition and therefore is waived in this petition. *Lane*, 521 N.E.2d at 949. Furthermore, appellate counsel need not raise on appeal an issue that in his professional judgment appears frivolous or unavailing. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 808–809. Schiro cites no evidence from the record showing unreasonable professional judgment on these seven issues. He does not give the basis on which he concludes the matters include any reversible error; he does not state the basis for the motion to dismiss or to set aside the verdict, or any of the instructions at issue, or the basis for objection to the evidentiary rulings.

[13] One of the issues involved a state's rebuttal witness, Linda Summerfield, who detailed an armed sexual assault which Schiro perpetrated against her. Schiro claims counsel should have more effectively cross-examined her and objected to an array of photos from which she picked him as her assailant. First, there is no showing as to what information might have been gained by further cross-examination of this witness, and second, Summerfield's testimony did no more than repeat one instance of as many as twenty-three instances of other unrelated sexual assaults Schiro committed which he himself related in a thirty-page statement.

(E)

[14] Schiro also cites counsel's failure to respond to his family's assertion the psychiatric witness, Dr. Osanka, tried to "shake him down" for an extra fee as a condition for the most favorable testimony. The trial judge found this story to be incredible. It rested on multiple hearsay as out-of-court declarations attributed by Schiro to his parents. The fact of this alleged "shakedown" was not shown in evidence and Schiro's parents never testified or told anyone else that this incident occurred.

(F)

Finally, Schiro claims counsel was deficient in not preventing jurors from seeing him transported in shackles. It has been held that reasonable jurors can expect a criminal defendant to be in restraints during breaks and while being transported. *Jenkins v. State* (1986), Ind., 492 N.E.2d 666, 669. We have distinguished between a prisoner appearing in court in bonds or shackles as in *Walker v. State* (1980), 274 Ind. 224, 229, 410 N.E.2d 1190, 1193–1194, and when being transported and seen incidental to that. *Sweet v. State* (1986), Ind., 498 N.E.2d 924, 929, requires a showing of actual harm where jurors see a defendant being transported in restraints. The trial court was justified in finding Schiro demonstrated no inadequacy in representation in any of these areas.

III

[15–20] Schiro claims the aggravating circumstance of intentional killing could not be considered at the penalty phase because the felony murder as charged lacked the requisite element of *mens rea* in committing the underlying rape. He attempts to apply a fundamental double jeopardy rule that a conviction of a lesser included offense is an acquittal of the greater offense. An aggravating circumstance, however, is not an offense. A person convicted of either type of murder, that is, intentional killing under IC 35-42-1-1(1), or felony murder IC 35-42-1-1(2), can be shown to contain the aggravator of intentional killing justifying the imposition of the death penalty. One can be found guilty of felony murder where the intention was to commit the underlying felony without necessarily

post-conviction relief which was denied by Special Judge James M. Dixon on May 29, 1984. This court affirmed the trial court's denial of post-conviction relief on June 28, 1985. *Schiro v. State* (1985), Ind., 479 N.E.2d 556. On February 24, 1986, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death sentence. *Schiro v. Indiana* (1986), 475 U.S. 1096, 106 S.Ct. 1247, 89 L.Ed.2d 355.

Thereafter Schiro instituted a petition for writ of habeas corpus in the United States District Court Northern District of Indiana, South Bend Division. Judge Allen Sharpe remanded to the state court, allowing Schiro to exhaust all available state remedies as required for federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254(b); *Ex Parte Hawk* (1944), 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572. Subsequently, on March 5, 1987, Schiro filed the instant action, his second post-conviction relief petition. He filed the timely motion for change of venue from the trial court and Monroe County Circuit Judge John Baker was appointed special judge, qualified, and assumed jurisdiction on March 25, 1987. Schiro's petition for post-conviction relief was denied by Judge Baker.

The issues raised in Schiro's direct appeal to this court are:

1. trial court error in dismissing four allegations of error based on a finding they were *res judicata* or waived as available but not taken in direct appeal at the original post-conviction relief petition;
2. ineffective representation of counsel at trial, in the direct appeal, and in the first post-conviction relief petition;
3. the jury's guilty verdict on felony murder was a conclusive finding of lack of intent such that a possible death sentence was foreclosed; and
4. accumulated error on all above issues which amounts to prejudice warranting reversal.

[1, 2] The post-conviction petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. Rule PC 1 § 5. The PC 1 hearing judge is the sole judge of the evidence and the credibility of the witnesses. *Popplewell v. State* (1981), Ind., 428 N.E.2d 15, 16. A petitioner who has been denied PC 1 relief is in the position of one who has received a negative judgment; he will not obtain a reversal unless the evidence on this point is undisputed and leads inevitably to a conclusion opposite to that of the trial court. To prevail on a claim of ineffectiveness of counsel, a petitioner must satisfy both sides of a two-prong test. He must prove counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Then he must prove that such substandard performance was so prejudicial as to have deprived him of a fair trial. A fair trial is denied when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* (1984), 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

I

Schiro claims it was erroneous to dismiss four sections of his petition which alleged a) failure of the statute to provide guidelines for consideration of the jury's recommendation and for appellate review of sentences; b) error in admitting a search warrant, affidavit, and physical items; c) error in excluding a handwritten document, and d) error in providing verdict forms. The trial court found these matters were either *res judicata* or waived as available but not taken in direct appeal or the original PCR petition.

[3–5] The purpose of the post-conviction relief process is to raise issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. Where an issue was available to the defendant on direct appeal but not pursued, it is waived for post-conviction review. *Sims v. State* (1988), Ind., 521 N.E.2d 336, 337. An issue which is raised and determined adverse to

petitioner's position is *res judicata*. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 807. In Schiro's direct appeal this court spoke directly of guidelines for considering the jury's recommendation and for appellate review of sentences. Our discussion included the standard of review of death sentences where the court's judgment is contrary to the jury's recommendation, the degree of conclusiveness regarding a jury recommendation of leniency, double jeopardy, where both the jury and the judge consider the imposition of the death penalty where their views are in conflict, and the finding that the judge independently considers the same facts on the same standards as the jury. *Schiro*, 451 N.E.2d at 1054–1058. Questions of legality of the search warrant, affidavit, and seizure of physical items were fully discussed and disposed of on direct appeal. Schiro's contention concerning the failure of the trial court to admit as evidence a certain handwritten document was fully presented and disposed of in the opinion on direct appeal. This court noted the document was given to a witness by a third party who said Schiro wrote it. The witness did not authenticate the document through knowledge of handwriting or presence at its penning, or any other accepted basis to authenticate a piece of handwriting. The only basis he had to believe the document was the out-of-court declaration of the person who gave it to him. We upheld the trial court's finding an insufficient foundation existed to permit admission of the document.

Finally, the direct appeal opinion considered and disposed of, adverse to Schiro, his contention he was harmed by lack of some necessary verdict forms. The entire record of the trial and the original PCR petition were put into evidence in the instant cause. The trial court had the ability to read the opinion and compare issues, and the power to dismiss these issues disposed of in this court's prior proceedings. The trial court properly found all four issues were so disposed and there was no error in dismissing them as *res judicata*.

II

Schiro claims in the instant cause there were several instances of inadequate assistance of counsel at the trial level and that subsequent counsel were deficient in not raising these issues on direct appeal or original post-conviction action. The state responds Schiro was not entitled to raise these issues in a subsequent post-conviction petition and moreover, when examined, these allegations fail to show prejudice or performance below the norms of professional representation. Schiro claims there were serious matters he brought to his attorney's attention before and during trial and that trial counsel brushed them off and failed to raise them. The record shows that after all these alleged events, when asked at the end of trial if he was satisfied with his representation, Schiro responded in the positive. He then accepted the same lawyer to prosecute his appeal. He now says counsel failed to present certain issues he wanted raised on appeal. However, when the time came to present his original post-conviction petition, Schiro failed to allege even one of these trial or appellate level matters.

The court of appeals recently stated in *Alston v. State* (1988), Ind.App., 521 N.E.2d 1331, 1335, that they would not "take a step backward and create a new vehicle by which a defendant could use a PCR to attack a previous PCR on the grounds of incompetency of counsel in that PCR hearing, and then use yet a third PCR to attack the competency of counsel of the second PCR and so on in perpetuity." In *Lane v. State* (1988), Ind., 521 N.E.2d 947, this Court noted that ineffective assistance of trial counsel would have been an issue available in the post-conviction petition. "*Lane*'s allegation of ineffective assistance is clearly an attempt to circumvent Rule PC 1, section 8, in order to present evidence on issues that had been waived." We stated further, "*Lane* cannot evade PC Rule 1, section 8, just by typing the words 'ineffective assistance of counsel.'" *Id.* 521 N.E.2d at 949.

[6, 7] If a petitioner is to prevail on a claim of ineffectiveness of counsel he must

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intending to commit the murder. It does not follow, however, that one convicted of felony murder cannot be shown to have intentionally killed the victim while perpetrating the felony. IC 35-50-2-9 provides in pertinent part:

(a) The State may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery. (emphasis added).

The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under IC 35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to IC 35-50-2-9, and the jury determined that the aggravating circumstance existed in that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct. In this same statute, § (f)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made has. There is therefore no error presented on this issue.

IV

Schiro claims that even if individually none of the above issues raise sufficient prejudice to require relief, cumulatively they do. Since we find no error on any of the issues above, no prejudicial error is presented in their accumulation.

The trial court is affirmed.

SHEPARD, C.J. and GIVAN, J. concur.

DeBRULER, J., dissents with separate opinion in which DICKSON, J., concurs.

DeBRULER, Justice, dissenting.

In this case appellant was charged in three separate counts. Count I charged murder as a knowing killing of the victim Count II charged murder as a killing in the course of a rape of the same victim. Count III charged murder as a killing in the course of deviate sexual conduct. The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. *Buckner v. State* (1969), 252 Ind. 379, 248 N.E.2d 348. *Smith v. State* (1951), 229 Ind. 546, 99 N.E.2d 417. *Cochran v. State* (1965), 246 Ind. 680, 208 N.E.2d 685, which appears to hold to the contrary is not, but in a waiver case. There the Court held that the double jeopardy claim against retrial was waived by filing a motion for new trial. Even if Cochran is valid law today, it does not apply here because appellant took no action between the guilty verdict on the murder charge of knowingly killing and the judge's sentencing finding of the aggravating circumstance that appellant had intentionally killed in the course of the rape, which one might deem a waiver.

At the trial, the prosecution used every resource at its disposal to persuade the jury that appellant had a knowing state of mind when he killed his victim. It failed to do so. At the sentencing hearing before the jury it had an opportunity to persuade the jury that appellant had an intentional state of mind when he killed his victim. The jury returned a recommendation of no death. At the sentencing hearing before the judge, the prosecution had yet another opportunity to demonstrate an intentional state of mind, and finally succeeded. In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. *Burlington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The difference in the two states of mind is significant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. IC 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

I would reverse the judgment and remand with instructions to grant post-conviction relief in the form of a new sentence of years upon the conviction for felony murder.

DICKSON, J., concurs.

All Justices Concur

) 1181 S.329)

STATE OF INDIANA)
) SS:
COUNTY OF BROWN)

IN THE BROWN CIRCUIT COURT
CAUSE NO. 81 CR 243

STATE OF INDIANA,
Plaintiff
v.
THOMAS N. SCHIRO,
Defendant

FILED
FEB 22 1983
CLERK BROWN CIRCUIT COURT

NUNC PRO TUNC ENTRY
PRONOUNCEMENT OF SENTENCING

The Defendant, Thomas N. Schiro, having been found guilty of Murder while committing and attempting to commit rape, by a jury on the 12th day of September, 1981, which verdict was: "We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information." William J. Yeager, Foreperson; dated September 12, 1981. The Court entered judgment of conviction of the said crime of Murder/Rape.

On September 15, 1981, the jury having been instructed to return, appeared. Present were Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana; the Defendant, Thomas N. Schiro, with his counsel, Michael Keating; and the members of the jury.

A hearing pursuant to Indiana Code 35-50-2-9 was held concerning the recommendation of sentencing. Both the attorney for the State and the attorney for the Defendant moved to incorporate the entire evidence of the trial. Said motion was granted by the Court. Arguments were made by the attorneys, instructions were read to the jury.

The jury, after due deliberation, returned unanimously with the recommendation that the death penalty not be imposed upon the Defendant, Thomas N. Schiro. The matter was set for sentencing on October 2, 1981.

On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the

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In the Matter of Brian G. EICHELHARDT.
No. 89S00-8906-DI-111.
Supreme Court of Indiana
Feb. 9, 1989.

ORDER ACCEPTING RESIGNATION

Comes now Brian G. Eichelhardt, an attorney admitted to the Bar of this State, and tenders his resignation from the Bar pursuant to Admission and Discipline Rule 23, Section 17.

And this Court, being duly advised, now finds that Brian G. Eichelhardt has met the requirements of the above noted rule and, accordingly, that his resignation should be accepted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Brian G. Eichelhardt is hereby removed as a member of the Bar of this State, and that the Clerk of this Court is directed to remove his name from the Roll of Attorneys.

IT IS FURTHER ORDERED that Brian G. Eichelhardt must comply with the provisions of Admission and Discipline Rule 23, Section 4, in order to become eligible for reinstatement at a future date.

The Clerk of this Court is directed to forward notice of this Order in accordance with the provisions of Admission and Discipline Rule 23, Section 3(d) governing disbarment and suspension.

Costs of this proceeding are assessed against the Respondent.

All Justices Concur

Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, subsection [1] The Aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:
(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) The mitigating circumstances that may be considered under this section are as follows:
(1) The defendant has no significant history of prior criminal conduct.
(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
(3) The victim was a participant in, or consented to the defendant's conduct.
(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
(5) The defendant acted under the substantial domination of another person.
(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
(7) Any other circumstances appropriate for consideration.

The statute provides, as a mitigating circumstance, whether (1) the Defendant has no significant history of prior criminal conduct. The record in this case shows numerous instances of prior criminal conduct by the Defendant.

(a) David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant

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submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense.

(b) The Defendant's witness, Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist.

(c) Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony.

(d) The Defendant had been previously convicted of robbery, a Class C Felony, in Vanderburgh County, Indiana, and was on work release when arrested for this crime.

(e) The Defendant's own witness, a psychologist, Dr. Frank Osanka of Naperville, Illinois, who is a behavioral consultant, in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyeurism, exhibitionism, sexual sadism, necrophelia, sexual telephone harrassment and other disorders.

Indiana Code § 35-50-2-9 provides two mitigating circumstances relating to Defendant's mental health:

> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
> and
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(a) The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard A. Woods, M.D., both indicated

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that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community.

(b) The record indicated that the Defendant has no remorse and is violent and sadistic. The Defendant's Psychologist and own witness, Dr. Frank Osanka, indicates that the Defendant is "overpowered by the need for erotic release".

(c) The fact that the Defendant committed these crimes, as the record shows, with gruesome, sadistic acts, including necrophelia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught, and malice in the crime for which he has been convicted. This shows that he planned the crime and planned how to avoid its consequences, showing Defendant's appreciation for the wrongfulness of his conduct and the consequences of his actions. This shows that Defendant had unimpaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

(d) This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

The Statute also provides as a mitigating circumstance,

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(3) The victim was a participant in, or consented to, the defendant's conduct.

The victim obviously did not consent to being murdered. Defendant was also found guilty beyond a reasonable doubt, of raping the victim, therefore the victim could not have consented to being raped.

The Statute also provides,

(4) the Defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

There is no evidence of an accomplice in this record.

The Statute provides,

(5) The defendant acted under the substantial domination of another person.

There is no evidence on this record that shows that any other person substantially dominated Defendant.

The Statute also requires the consideration of,

(7) Any other circumstances appropriate for consideration.

The age of the Defendant is twenty years. The Court does not find this to be a mitigating circumstance.

Since the State proved "beyond a reasonable doubt the existance of at least (1) of the aggravating circumstances alleged", (Indiana Code § 35-50-2-9, Section 9(9)) and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff.

Samuel R. Rosen

SAMUEL R. ROSEN, JUDGE
BROWN CIRCUIT COURT

Dated: October 2, 1981

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Vacation of accused's conviction of assault and battery with intent to gratify sexual desires did not require vacation of habitual criminal sentence on theory that the habitual criminal charge was coupled with the vacated assault and battery charge and not rape charge of which accused was also convicted. McCormick v. State, 1974, 317 N.E.2d 428, 262 Ind. 303.

79. Review—In general

Robbery conviction would not be vacated where prosecutor filed habitual offender allegation only six days before trial was scheduled, but defendant did not present any explanation of manner in which he was prejudiced by timing of additional charge, even though charge carrying potential of substantial penalty would not normally be labeled matter of form. Russell v. State, 1986, 497 N.E.2d 136.

Probation officer's testimony as to defendant's admissions to having been convicted of and sentenced for two prior felonies forming basis of habitual offender count, without any showing that defendant had been given *Miranda* warning at time of admissions, was not fundamental error so as to warrant relief absent contemporaneous objection, where there was no question but that defendant was habitual offender. Foster v. State, 1985, 484 N.E.2d 965.

Although sentencing court's language ordering defendant sentenced to ten years for the first count and second count, habitual criminal for the offense of the first count, dealing in a narcotic drug was somewhat confusing, the Supreme Court would indulge in a presumption that the trial judge intended to enhance the sentence on the first count by 30 years due to defendant's status as an habitual offender. Radford v. State, 1984, 468 N.E.2d 219.

Where the trial court, in respect to habitual offender information, sustained defendant's objections to the admission of one of the state exhibits, which purported to show that defendant had two prior unrelated felony convictions in Kentucky, where the state thus had only one prior felony conviction in evidence, and where the trial court then sua sponte dismissed the habitual offender count with prejudice, the action of the trial court did not constitute a finding that the information was, somehow, insufficient; accordingly, the state could not appeal under IC 35-1-47-2 [repealed; see, now, IC 35-38-4-2] requiring the state to appeal "from a judgment for the defendant, on quashing or setting aside an indictment or information." State v. Holland, 1980, 403 N.E.2d 832, 273 Ind. 284.

80. —— Remand, review

Remand for determination of whether trial court, in prior theft case, imposed a felony or misdemeanor judgment was necessary as regards habitual offender count where it was unclear whether the court, in issuing nunc pro tunc order modifying original two-year sentence to one-year term, was revising the penalty to correspond to a finding that the Class D felony punishment was being reduced based on mitigating factors or because court was treating the crime as a Class C misdemeanor. Blatz v. State, 1985, 486 N.E.2d 990.

As trial court imposed sentence for the underlying offense and then imposed an additional sentence for defendant's being an habitual offender, but as habitual offender status is not a separate offense, trial court's sentences were erroneous and had to be remanded for correction. Maul v. State, 1984, 467 N.E.2d 1197.

Imposition of separate sentences of five years for forgery and 30 years on habitual offender determination was error and case had to be remanded for imposition of enhanced sentence of 35 years for forgery conviction. Wendling v. State, 1984, 465 N.E.2d 169.

Reviewing court would not dismiss habitual criminal charge, notwithstanding allegedly nonviolent nature of prior auto theft or characterization of instant crime as mere "purse snatching" and that defendant was only 17 and 20 years old at times his prior felonies were committed; it is not prerogative of reviewing court to interfere with discretionary power of the state to invoke habitual criminal penalties. Rodgers v. State, 1981, 422 N.E.2d 1211.

35-50-2-9 Death sentence

Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed

in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty (20) or more years remaining to be served before his earliest possible release date as defined by IC 35-38.

(11) The defendant dismembered the victim.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

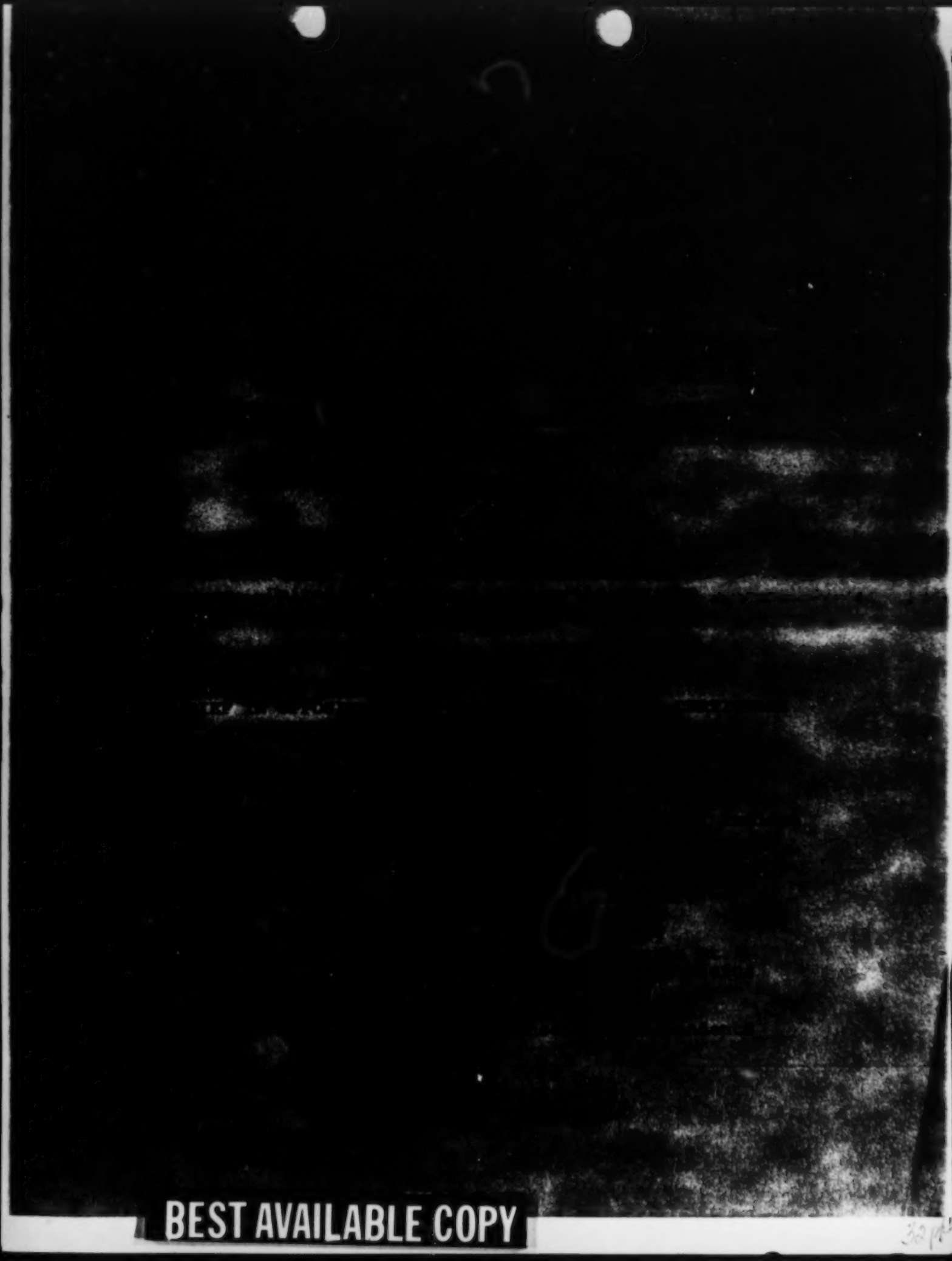
(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As added by Acts 1977, P.L.340, SEC.122. Amended by P.L.336-1983, SEC.1; P.L.212-1986, SEC.1.*



QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider a petition for writ of certiorari filed 273 days after entry of the court of appeals' original judgment, where the court of appeals refused to recall its mandate before accepting and denying an untimely petition for rehearing.

2. Whether a defendant is subjected to double jeopardy at his original sentencing hearing when, upon a jury verdict of felony murder, the trial judge imposes the death sentence based on the aggravating circumstance of "intentionally killing the victim while committing . . . rape . . .," where the state supreme court has held that the jury verdict was not an acquittal of knowing murder as a matter of state law.

3. Whether the Petitioner waived review of his collateral estoppel claim by failing to raise it in the lower courts.

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TABLE OF AUTHORITIES

No. 92-7549

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THOMAS N. SCHIRO, Petitioner,

v.

RICHARD CLARK, Superintendent, and
INDIANA ATTORNEY GENERAL Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Petition for Writ of Certiorari is jurisdictionally out of time. The Petition was not filed within 90 days after the court of appeals' judgment of affirmance on May 8, 1992, as required by U.S. Sup. Ct. R. 13.1. The court of appeals refused to recall its mandate and lacked jurisdiction to consider the untimely petition for rehearing which it permitted to be filed instanter. Thus the time for seeking certiorari did not restart with the valid denial of a "timely petition for rehearing" under Rule 13.4.

STATEMENT OF THE CASE

Petitioner Thomas Schiro ("Schiro"), who was serving a suspended felony sentence at the Second Chance Halfway House in Evansville, Indiana, gained entrance to the home of Laura Luebbehusen on the pretext that he needed to use her telephone. He exposed himself, drank liquor, took drugs (and told

Luebbehusen to do so) and raped her three times. He then (by his own account) decided that he had to kill Luebbehusen so that she could not report the rapes.

Schiro hit Luebbehusen on the head with a vodka bottle until it shattered. She fought him, so he picked up an iron and beat her with it. Luebbehusen continued to fight until Schiro strangled her to death. He then performed vaginal and anal intercourse on the body.

Schiro was charged in three alternative counts with (1) "knowingly" killing another human being, Ind. Code § 35-42-1-1(1); (2) killing another human being while committing or attempting to commit rape, Ind. Code § 35-42-1-1(2); or (3) killing another human being while committing or attempting to commit criminal deviate conduct, id. At the guilt phase of the bifurcated trial Schiro raised an insanity defense.[1]

The jury, using a verdict form which listed all three charged counts, found Schiro guilty as charged on Count II, felony murder while committing rape. The other counts on the form were left blank. After a sentencing hearing the jury recommended against the death sentence.

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[1] Schiro apparently attempted to fool the jury into thinking he was mentally disturbed by rocking in his chair whenever they were in the courtroom. The trial judge, who observed that this behavior stopped when the jury was out, was not fooled (Pet. App. A-46). See also Schiro v. State, 479 N.E.2d 556, 559 (Ind. 1985), cert. denied, 475 U.S. 1036 (1986); Schiro v. Clark, 963 F.2d 962, 975 (7th Cir. 1992) (Pet. App. A-8).

The trial judge, who was not bound by the jury's recommendation, see Ind. Code § 35-50-2-9(e), sentenced Schiro to death. He found the following aggravating circumstance: "The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery." (Pet. App. A-44.) See Ind. Code § 35-50-2-9(b)(1) (Burns 1985). The trial court found no mitigating circumstances. (Pet. App. A-44 - A-47.)

In his second post-conviction petition in the state courts, Schiro argued that his conviction of felony murder constituted an acquittal of knowing murder, and that the trial judge's reliance on the "intentional[] killing" aggravating circumstance was double jeopardy. The Indiana Supreme Court, pointing out that neither felony murder nor murder is an included offense of the other under Indiana law, held that where the jury "finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider." Schiro v. State, 533 N.E.2d 1201, 1208 (Ind.), cert. denied, 493 U.S. 910 (1989) (Pet. App. A-42). The court also noted that Count I charged Schiro with knowingly killing, not intentionally killing, so the jury had not even considered the issue of whether Schiro had "intentionally" killed the victim. Id.

The district court denied federal habeas corpus relief, finding the Indiana Supreme Court's holding to be a

determination of state law binding on the federal courts. Schiro v. Clark, 754 F.Supp. 646, 660, 663 (N.D. Ind. 1990) (Pet. App. A-18, A-19).

The court of appeals agreed, holding that "[s]ince the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen." Schiro v. Clark, 963 F.2d 962, 970 (7th Cir. 1992) (Pet. App. A-6). In a footnote the court noted that Schiro had not raised the separate collateral estoppel argument mentioned by Justice Stevens in his opinion respecting the denial of certiorari. 963 F.2d at 970 n.7 (Pet. App. A-6); see Schiro v. Indiana, 493 U.S. 910, 913-14 (1989) (Stevens, J.).

The judgment of the court of appeals affirming the district court's decision was entered on May 8, 1992 (Appendix 1a). The mandate issued on June 1, 1992 (App. 2a). On August 18, 1992, 102 days after judgment was entered, Schiro's counsel and Schiro pro se filed separate motions with the court of appeals. Each asked the court to recall its mandate and each tendered a petition for rehearing in banc with a request that it be accepted instanter. The Respondents opposed both motions.

On August 25, 1992, the court of appeals denied counsel's motion to recall the mandate but granted his motion to accept the petition for rehearing instanter (App. 3a). Schiro's pro se motions were denied. Counsel's petition for rehearing was denied on September 8, 1992 (Pet. App. A-10). The Petition for Writ of Certiorari was docketed in this Court

on February 5, 1993, the date to which Justice Stevens had extended the time for filing, but 273 days after the court of appeals' original judgment affirming the denial of habeas corpus relief.

SUMMARY OF ARGUMENT

I. Because the court of appeals refused to recall its mandate, it lacked jurisdiction to accept and rule on Schiro's untimely petition for rehearing. Thus there was no "timely petition for rehearing" which tolled Schiro's time to petition this Court for certiorari under U.S. Sup. Ct. R. 13.4, and his Petition is jurisdictionally out of time.

II. Schiro's double jeopardy claim is based on the unique facts of this case, as to which there is no split among the Circuits or even any prior determination of the point by another federal court. Other than his claim that the court of appeals erred, Schiro has presented no "special and important reasons" for review by this Court. U.S. Sup. Ct. R. 10.1.

Moreover, the question of whether the jury acquitted Schiro of intentional killing when it returned a verdict of felony murder is an issue of state law, the resolution of which by the Indiana Supreme Court is not reviewable by this Court. For the purposes of double jeopardy, the issue of whether multiple punishments can be imposed in a single trial is also a question of state law.

Schiro's argument that a bifurcated sentencing hearing is a second "trial" for double jeopardy purposes is unsupported

by this Court's precedents, which hold only that a second sentencing hearing after remand implicates the policies protected by the Double Jeopardy Clause. The sentencing phase is merely an extension of the trial, and the judgment does not become final until sentence is imposed. The allegation that the trial judge's conclusion was in some respect inconsistent with the jury's verdict on guilt does not implicate any federal constitutional question.

Schiro is not claiming that the jury's sentencing recommendation precluded the trial court's sentence based on intentional killing during a felony murder. Neither is he contending that the use of the felony murder aggravating circumstance violated the Eighth Amendment.

III. Schiro has waived his collateral estoppel claim by failing to present it in the lower courts.

The collateral estoppel issue is without merit in any event. As the Indiana Supreme Court found, the jury's silence on the "knowing" murder count did not determine the issue of whether Schiro "intentionally" killed the victim, and thus had no preclusive effect. Furthermore, the jury's verdict on guilt was not a "final judgment" for estoppel purposes because sentence had not yet been imposed.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI IS JURISDICTIONALLY OUT OF TIME.

The Petition was filed on February 5, 1993, the 273rd day after the court of appeals' judgment was entered on May 8, 1992. The Petition is timely only if its filing is calculated from the denial of a "timely petition for rehearing." U.S. Sup. Ct. R. 13.4. This determination depends upon the validity of the court of appeals' acceptance of Schiro's late petition for rehearing.

The court of appeals lacked jurisdiction to consider the late petition for rehearing because it expressly refused to recall its mandate which was issued on June 1, 1992. (App. 3a.) The issuance of a mandate divests a court of appeals of jurisdiction over an appeal, including jurisdiction to consider a petition for rehearing. Johnson v. Bechtel Associates, 801 F.2d 412, 415-16 (D.C. Cir. 1986); United States v. DiLapi, 651 F.2d 140, 144 (2nd Cir. 1981), cert. denied, 455 U.S. 938 (1982).

The Second Circuit suggested in DiLapi that a court of appeals need not reacquire jurisdiction to deny a petition for rehearing, 651 F.2d at 144 n.2, and in a later case further inferred that it need not recall the mandate to deny an extension of time to seek rehearing. Marino v. Ortiz, 888 F.2d 12, 13 (2nd Cir. 1989), cert. denied, 495 U.S. 931 (1990). This analysis begs the jurisdictional question, but does not apply here in any event because the court of appeals in this case granted the motion to accept the late petition for rehearing.

The fact that the court of appeals granted leave to file the late petition for rehearing does not mean that it should have recalled the mandate, for the standards are different. A mandate will be recalled "only in exceptional circumstances." Patterson v. Crabb, 904 F.2d 1179, 1180 (7th Cir. 1990) (recalling mandate where court of appeals mistakenly dismissed appeal, having overlooked final judgment); see also Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988) (mandate will be recalled for "good cause" or to "prevent injustice" but only in exceptional circumstances); Johnson, 801 F.2d at 416 (mandate will be recalled only in "exceptional circumstances" and for "special reasons"); Greater Boston Television v. FCC, 463 F.2d 268, 277-80 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972).

The time for filing a petition for rehearing, on the other hand, may be enlarged merely upon a showing of "good cause," even if the time has expired. Fed. R. App. P. 26(b), 40(a). In the instant case the court of appeals apparently found "good cause" to allow the instanter filing of the petition for rehearing but could not find "exceptional circumstances" justifying the recall of its mandate.

The court of appeals failed to recognize, however, that its refusal to recall the mandate deprived it of jurisdiction to make any further ruling in the case. Thus its consideration and denial of the late petition for rehearing were void acts which had no effect on the timeliness of the Petition for Writ of Certiorari filed in this Court. Any other

holding would permit an unsuccessful appellant to restart the time for certiorari simply by presenting a late petition for rehearing for instanter filing.

The Petition should be dismissed for want of jurisdiction. If the Petition is granted, the Court will be required to decide as a threshold issue the question of whether a court of appeals retains jurisdiction to accept an untimely petition for rehearing without recalling its mandate.

II. SCHIRO'S DOUBLE JEOPARDY CLAIM DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

Schiro's primary claim is that the jury's choice of felony murder (Count II) at the guilt phase of his trial, and its silence on the count of "knowing" murder (Count I), constituted an acquittal of the latter. Thus he reasons that he was subjected to double jeopardy when, at the sentencing phase of the same trial, the state alleged and the trial judge found that he was eligible for the death sentence based on an aggravating circumstance which required a showing that he "intentionally" killed the victim during the course of a rape or criminal deviate conduct.

A. There Are No "Special And Important Reasons" To Review The Unique, Fact-Specific Issue Presented By The Petition.

This case presents unique facts. A ruling on the double jeopardy issue put forth by Schiro will affect only cases in which a defendant is charged with both intentional

murder and felony murder; in which the jury convicts of felony murder and is silent as to intentional murder; and in which the prosecution seeks the death sentence on the basis of an aggravating circumstance which includes an element of intentional killing.

There is no split among the Circuits on the issue, and in fact Schiro cites no other published decision in which the issue has arisen in a capital case.[2] He asserts simply that the court of appeals' decision departs from this Court's precedents, none of which (as explained below) are on point with the situation presented here.

In the absence of "special and important reasons" for this Court to review this case, the Petition should be denied.

B. The Meaning Of A Jury's Silence On One Count, And The Determination Of The Permissibility of Multiple Punishments in a Single Trial, Are Issues of State Law.

1. The court of appeals, relying on prior circuit precedent as to which this Court denied review, held that the meaning of the jury's silence on Count I ("knowing" murder) is a matter of Indiana law. Schiro v. Clark, 963 F.2d at 970

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[2] It is well settled in noncapital cases that double jeopardy is not violated by a sentencing court's reliance on a charges of which the defendant was acquitted. United States v. Rodriguez-Gonzalez, 899 F.2d 177, 179-81 (2nd Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 127, 112 L.Ed.2d 95 (1990); see United States v. Moreno, 933 F.2d 362, 374 (6th Cir.), cert. denied sub nom. Morris v. United States, ___ U.S. ___, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

(Pet. App. A-6), citing United States ex rel. Young v. Lane, 768 F.2d 834, 841 (7th Cir.), cert. denied, 474 U.S. 951 (1985). A state supreme court's determination of state law is binding on this and other federal courts. See Michigan v. Long, 463 U.S. 1032, 1038 n.4 (1983).

Schiro argues the Indiana Supreme Court was incorrect in its interpretation of Indiana law, and that a silent verdict on one count is the equivalent of acquittal on that count. See, e.g., Buckner v. State, 253 Ind. 79, 248 N.E.2d 348, 351 (1969). This general rule does not apply, however, where the "multiple counts were merely different charges of the same offenses." Cichos v. State, 246 Ind. 680, 208 N.E.2d 685 (1965). Significantly, this Court accepted this distinction and dismissed a previously granted writ of certiorari in Cichos in part because the Indiana Supreme Court had determined the effect of the silent verdict as a matter of state law. Cichos v. Indiana, 385 U.S. 76, 79-80 (1966).

2. Invocation of the Double Jeopardy Clause does not alter the conclusion that this case is controlled by state law, because multiple punishments arising from a single trial implicate double jeopardy only where such punishments are not intended by the legislature. Missouri v. Hunter, 459 U.S. 359, 368 (1983). The state courts' determination of legislative intent in this regard is binding on the federal courts, including this Court. Id.

The Indiana Supreme Court has found, as a matter of Indiana law, that a jury's verdict of felony murder does not

preclude the sentencing judge from finding an intentional killing in support of a death sentence. This determination, unreviewable by a federal court, satisfies the Fifth Amendment's concern that the sentencing discretion of courts is confined to the limits established by the legislature. Jones v. Thomas, 491 U.S. 376, 381 (1989).

Schiro's bifurcated sentencing hearing was not a separate "trial" for double jeopardy purposes, and Schiro's argument to the contrary finds no support in this Court's precedents. The Court has found, of course, that a state may not make repeated attempts to sentence a defendant to death. Bullington v. Missouri, 451 U.S. 430 (1981); see Arizona v. Rumsey, 467 U.S. 203 (1984). But the Court has limited Bullington and Rumsey to resentencing hearings, Spaziano v. Florida, 468 U.S. 447, 458-59 (1984), and has never suggested that an original sentencing hearing places a defendant "in jeopardy" a second time as to issues litigated in the guilt phase of the same trial.

The original sentencing hearing is merely an extension of the trial and does not implicate the policies which lie behind prohibition of multiple trials. While these concerns of embarrassment, anxiety and expense are implicated by a second attempt to sentence a defendant to death, Bullington, 451 U.S. at 445, they are not present at the original sentencing hearing.

Schiro's "multiple-trial" argument also overlooks the settled principle that a judgment of conviction does not become final until the defendant is sentenced. Hopkins v. State, 420

N.E.2d 895, 896 (Ind. App. 1981); see Midland Asphalt v. United States, 489 U.S. 794, 798 (1989); Berman v. United States, 302 U.S. 211, 212 (1937). Thus Schiro was not subjected to double jeopardy so much as he was subjected to an internally inconsistent result from the jury (on guilt) and the judge (on sentence). Allegedly inconsistent verdicts, however, do not implicate any constitutional guarantee so long as the evidence supports them. United States v. Powell, 469 U.S. 57 (1984).[3]

3. Both the question of whether the jury's silence on Count I was an acquittal and the permissibility of multiple findings for double jeopardy purposes, are questions of Indiana law not reviewable by this Court. These questions of state law do not present important questions of federal law justifying the grant of a writ of certiorari. U.S. Sup. Ct. R. 10.1(c).

C. Even If The "Acquittal" Issue Were A Federal Question, It Is Clear That The Jury's Silence On The "Knowing" Murder Count Was Not An Implied Acquittal For Double Jeopardy Purposes.

Were this Court to hold that a bifurcated sentencing hearing is a multiple "trial" subject to the "implied acquittal" analysis of Green v. United States, 355 U.S. 184 (1957), the

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[3] In noncapital cases a sentencing judge is free to consider conduct of which the defendant has been acquitted. See cases cited supra at 10 n.2. At least one court has held that a sentencing judge is free to disagree with the jury's resolution of the case and enhance the sentence accordingly. United States v. Bryant, 892 F.2d 1466, 1470-72 (10th Cir. 1989), cert. denied, 496 U.S. 939 (1990).

result in this case would still be the same. Unlike the verdict in Green, the verdict in the instant case was not a choice between two different offenses, but instead represented a choice between two different theories of culpability for the same offense.

Ind. Code § 35-42-1-1 does not define different crimes, but simply defines different theories under which a defendant may be found guilty of murder. See, e.g., Schad v. Arizona, 501 U.S. ___, 111 S.Ct. 2491, 2499-500, 115 L.Ed.2d 555 (1991). Based on this distinction, at least one federal court has held that where a jury convicted a defendant of premeditated murder but was silent on felony murder, he had not been impliedly acquitted of felony murder under Green. Thus retrial on both counts and a resulting conviction of felony murder did not violate the Double Jeopardy Clause. United States ex rel. Jackson v. Follette, 462 F.2d 1041 (2d Cir.), cert. denied, 409 U.S. 1045 (1972).

The holding in Poland v. Arizona, 476 U.S. 147 (1986), supports this reasoning. Poland held that a resentencing does not violate the Double Jeopardy Clause as interpreted in Bullington where the defendant received a death sentence at the first hearing but the trial court's application of aggravating circumstances was erroneous. The Court held that while a defendant can be "acquitted" of the death penalty by receiving a life sentence at the first hearing, one cannot be "acquitted" of a particular aggravating circumstance. If a defendant cannot be "acquitted" of a particular aggravating circumstance

in multiple hearings, it follows that he cannot be "acquitted" of a single element of an aggravating circumstance.

Because the result of this case would be no different even under the analysis suggested by Schiro, this Court should not expend its limited resources to render an advisory opinion leading to the same result reached by the lower courts.

D. Schiro Is Not Contending That The Trial Judge's Rejection Of The Jury's Sentence Recommendation Violated Double Jeopardy, Nor Is He Raising A Claim Under The Eighth Amendment.

1. Schiro's contentions in this Court are based solely on the jury's verdict at the guilt phase of his trial, not the jury's recommendation that he receive a life sentence. (Petition at 8-9.) His contention that the jury's sentencing recommendation had independent significance was correctly rejected by the lower courts on the basis of Spaziano v. Florida, 468 U.S. 447 (1984), and has not been raised here.

The court of appeals clearly treated these claims separately, and did not rely on Spaziano in analyzing the effect of the jury's verdict of guilt. Schiro v. Clark, 963 F.2d at 970-71 (Pet. App. A-6). Nothing in the court of appeals' opinion suggests that it "assum[ed] that Spaziano somehow preempts all other constitutional provisions," as Schiro rather unfairly charges. (Petition at 9.)

2. Schiro's "acquittal" arguments throughout this case have been based on the Double Jeopardy Clause of the Fifth Amendment. Schiro is not claiming that the use of the felony

murder aggravator violated the Eighth Amendment. Thus this case does not raise or have implications for the issue now before the Court in Tennessee v. Middlebrooks, No. 92-989, cert. granted, 113 S.Ct. ___ (April 19, 1993); see 61 U.S.L.W. 3526 (summary of petition for writ of certiorari); see also State v. Middlebrooks, 840 S.W.2d 317, 341-47 (Tenn. 1992).

III. SCHIRO WAIVED HIS COLLATERAL ESTOPPEL CLAIM BELOW, AND THE ISSUE DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION IN ANY EVENT.

1. Schiro's independent claim that the jury's silence on "knowing" murder estopped the state from seeking the death penalty on the basis of intentional killing was not raised in the lower courts. It is not mentioned in any of the state court opinions or the decision of the federal district court. The court of appeals pointed out in a footnote that Schiro had not raised the collateral estoppel argument mentioned by Justice Stevens in his opinion respecting the denial of certiorari. 963 F.2d at 970 n.7 (Pet. App. A-6); see Schiro v. Indiana, 493 U.S. 910, 913-14 (1989) (Stevens, J.).

This Court will not grant certiorari to review issues neither raised in nor ruled upon by the lower courts. See Berkemer v. McCarty, 468 U.S. 420, 443 (1984); Delta Air Lines v. August, 450 U.S. 346, 362 (1981).

2. The collateral estoppel claim is without merit in any event. Estoppel applies when an issue of ultimate fact has been determined by a valid and final judgment. Ashe v. Swenson, 397 U.S. 436, 443 (1970). For two reasons, the jury's silent

verdict on Count I in this case does not meet this test.

First, the jury's silence on Count I did not determine the issue of intent. As has been noted above, the jury's finding that Schiro was guilty of felony murder did not, as a matter of Indiana law, constitute a determination that he was innocent of knowing murder. Moreover, the Indiana Supreme Court held that the jury, in deciding whether Schiro was guilty of "knowingly" killing the victim under the murder statute, was not presented with the issue of whether he "intentionally" killed the victim for the purposes of the aggravating circumstance. Schiro v. State, 533 N.E.2d at 1208 (Pet. App. A-42).

Second, the jury's verdict on guilt was not a "final judgment" under Indiana law because Schiro had not yet been sentenced. Hopkins v. State, 420 N.E.2d 895, 896 (Ind. App. 1981); see Midland Asphalt v. United States, 489 U.S. 794, 798 (1989); Berman v. United States, 302 U.S. 211, 212 (1937). Thus the trial judge was not legally precluded from finding, on the basis of his independent review of the facts, that Schiro intentionally killed the victim during the felony murder of which the jury had found Schiro guilty.

This Court has held that a defendant's "substantial participation" in a felony murder may justify imposition of the death penalty notwithstanding the fact that the evidence does not support a verdict of intentional or premeditated murder. Tison v. Arizona, 481 U.S. 137 (1987). Indiana has addressed this concern by imposing the death penalty only where a killing in the course of a felony murder was intentional. Schiro asks

the Court to undermine both Tison and Indiana's salutary efforts by holding that whenever a jury chooses felony murder in lieu of premeditated or knowing murder, the trial court is precluded from imposing a death sentence based on clear proof that the killing was intentional.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana

WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)

April 22, 1993

APPENDIX

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 8, 1992

BEFORE: **Honorable** WALTER J. CUMMINGS, Circuit Judge

Honorable HARLINGTON WOOD, JR., Circuit Judge*

Honorable FRANK H. EASTERBROOK, Circuit Judge

No. 91-1509

THOMAS SCHIRO,
Petitioner - Appellant

v.

RICHARD CLARK, Superintendent and INDIANA ATTORNEY GENERAL,
Respondents - Appellees

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division
No. 83 C 588, Judge Allen Sharp

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED**, in accordance with the decision of this court entered this date.

*Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.
(1061-030690)

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

DATE: June 1, 1992

TO: Geraldine J. Crockett
United States District Court
Northern District of Indiana
Room 102
South Bend Division
102 Federal Building
South Bend, IN 46601

FROM: Thomas, F. Strubbe, Clerk

RE: 91-1509
Schiro, Thomas v. Clark, Richard
83 C 588, Judge Allen Sharp

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[ ] No record filed
[x] Original record on appeal consisting of:

ENCLOSED:		**TO BE RETURNED AT LATER DATE:**
[ ]	Volumes of pleadings	[2]
[ ]	Loose pleadings	[ ]
[ ]	Volumes of transcripts	[1]
[ ]	Volumes of State Court pleadings	[16]
[ ]	Volumes of State Court briefs	[7]
[ ]	Volumes of State Court loose pleadings	[6]
[ ]	Other_____	[ ]
	Record being retained for use in Appeal No. _____	[ ]

Copies of this notice sent to: Counsel of record
[ ] United States Marshall
[ ] United States Probation Office

NOTE TO COUNSEL:
If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

- -

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: _____ _____
(1071-010891) Deputy Clerk, U.S. District Court

United States Court of Appeals cs

For the Seventh Circuit
Chicago, Illinois 60604

August 25, 1992

By the Court:

THOMAS SCHIRO, Petitioner-Appellant, No. 91-1509 v. RICHARD CLARK, Superintendent and INDIANA ATTORNEY GENERAL, Respondents-Appellees.	] Appeal from the United] States District Court for] the Northern District of] Indiana, South Bend] Division.]] No. 83 C 588] Allen Sharp,] Chief Judge.]

This matter comes before the court for its consideration of the following documents:

1. MOTION TO RECALL MANDATE filed herein on 8/18/92, by counsel for the appellant.

2. MOTION TO ACCEPT PETITION FOR REHEARING IN BANC INSTANTER filed herein on 8/18/92, by counsel for the appellant.

3. VERIFIED PETITION TO RECALL THE MANDATE AND PERMIT THE FILING OF A PETITION FOR REHEARING AND SUGGESTION FOR AND REHEARING IN BANC OUT OF TIME filed herein on 8/18/92, by the pro se appellant.

4. RESPONSE TO MOTIONS TO RECALL MANDATE AND ACCEPT PETITION FOR REHEARING INSTANTER filed herein on 8/25/92, by counsel for the appellees.

On consideration thereof,

IT IS ORDERED that the Motion to Recall the Mandate is **DENIED.**

IT IS FURTHER ORDERED that the Motion to Accept Petition for Rehearing in Banc Instanter is **GRANTED** and the clerk of this court is directed to file as of 8/21/92 the petition for rehearing tendered by appointed counsel for the appellant.

IT IS FURTHER ORDERED that the Verified Petition to Recall the Mandate and Permit the Filing of a Petition for Rehearing and Suggestion for and Rehearing in Banc Out of Time is **DENIED.**

STATE OF INDIANA
OFFICE OF THE ATTORNEY GENERAL
INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR
402 WEST WASHINGTON STREET • INDIANAPOLIS, IN 46204-2770
TELEPHONE (317) 232-6201

April 22, 1993

ATTN: Mr. Chris Vasil, Deputy Clerk
Supreme Court of the United States
One First Street, N.E.
Washington DC 20543

Re: No. 92-7549, Schiro v. Clark

Dear Mr. Vasil:

Enclosed please find 13 copies of Brief in Opposition to Petition For Writ of Certiorari in the above case, with Certificate of Service.

Please file the Brief with the Court and return a file-marked copy of the Petition and the Certificate to me in the enclosed self-addressed and stamped envelope.

Thank you for your assistance and cooperation in this matter.

Very truly yours,

Wayne E. Uhl
Deputy Attorney General

WEU:mmi:WPP

Enclosures.

cc: Ms. Monica Foster

No. 92-7549

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THOMAS N. SCHIRO, Petitioner,

v.

RICHARD CLARK, Superintendent, and
INDIANA ATTORNEY GENERAL, Respondents.

CERTIFICATE OF SERVICE

I, Wayne E. Uhl, a member of the Bar of this Court, hereby certify that one copy of the Brief in Opposition to Petition for Writ of Certiorari in this case was served upon counsel of record listed below by U.S. mail, first-class postage prepaid, on this the 22 day of April, 1993, and that all parties required to be served have been served:

Monica Foster
HAMMERLE & FOSTER
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Indianapolis IN 46202

Wayne E. Uhl
Deputy Attorney General
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Telephone: (317) 232-6333
WEU:mmi:WPP

No. 92-7549

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THOMAS N. SCHIRO, Petitioner,

v.

RICHARD CLARK, Superintendent, and
INDIANA ATTORNEY GENERAL, Respondents.

CERTIFICATE OF SERVICE

I, Wayne E. Uhl, a member of the Bar of this Court, hereby certify that one copy of the Brief in Opposition to Petition for Writ of Certiorari in this case was served upon counsel of record listed below by U.S. mail, first-class postage prepaid, on this the 22 day of April, 1993, and that all parties required to be served have been served:

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No. 92-7549

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No. 92-7[illegible]

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

[illegible] M. SCHIRO,

Petitioner,

v.

[illegible]ARD CLARK,
Superintendent, Indiana
Indiana State Prison,
et. al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF OF PETITIONER

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Cause No. 92-7549

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I. This Court has jurisdiction to hear this case

Respondent claims the Circuit Court lacked jurisdiction to permit Schiro to file his rehearing petition instanter and as such his Petition for Writ of Certiorari was due within 90 days of the panel opinion. It claims that the Circuit Court lacked jurisdiction to permit such filing because it did not specifically recall the mandate when it granted permission to file instanter and subsequently denied the rehearing petition on the merits. Brief in Opposition at 7-9.

This Court does have jurisdiction; the Petition for Writ of Certiorari was timely filed. The facts are:

1. The panel opinion was issued on May 8, 1992.

2. A motion to file rehearing instanter was tendered on August 18, 1992 and directed to be filed as of August 21, 1992.[1]

3. Permission to file the petition for rehearing instanter was granted on August 25, 1992.

4. The "instanter" petition for rehearing was denied on August 25, 1992.

See generally, Appendix 3a of Brief in Opposition.

The Circuit Court did not recall the mandate when it granted permission to file the rehearing instanter or when it denied the petition for rehearing. Only if the Circuit Court decided to *grant* the rehearing petition was it required to recall the mandate:

> Because the [government's] motion was made after our mandate issued, the district court found that jurisdic-

---

[1] Previous counsel filed the request to file the petition for rehearing instanter. In that pleading, counsel averred that he had appropriately mailed a timely petition for rehearing but that said mailing was never received by the Circuit Court. A copy of this motion is attached hereto as A-1.

> tion revested in it and that recall of our mandate was necessary to toll the Act. Under Fed.R.App.P. 41(a), a timely filing of a petition for rehearing stays the mandate until disposition of the petition. However, ***no reacquisition of appellate jurisdiction is needed to deny a petition for rehearing filed after the mandate has issued.*** *(citation omitted)* Although this court did not explicitly recall or stay the mandate, we had inherent power to do so. *(citations omitted)* ***Had we granted the government's petition, we would have recalled the mandate.*** *(citation omitted, emphasis added)*

United States v. Black, 733 F.2d 354 at 351 (5th Cir. 1984). See also United States v. Raineri, 670 F.2d 702, 719 (7th Cir. 1982).

Respondent confuses the difference between granting *permission* to file instanter with the granting of a belated petition for rehearing. Since the Circuit Court had jurisdiction to permit the filing of the rehearing petition instanter and deny the rehearing petition on its merits, it was not necessary for the court to recall the mandate. The Circuit Court had jurisdiction to consider the petition for rehearing and this Court has jurisdiction to hear Schiro's case. Schiro's instant petition was timely filed.[2]

II. This Court should grant the writ on the merits

Respondent concedes that a silent verdict generally constitutes an acquittal under state law, but claims an exception to the general rule bars relief. Brief in Opposition at 11. This concession is paramount to Schiro's double jeopardy claim.[3] The Circuit

[2] Interestingly, in its Brief in Opposition, Respondent claims that Schiro's instant petition was untimely -- yet it raises this "late filing" claim in a Brief which it filed six (6) weeks after the due date. Respondent's Brief was due on or before March 8, 1993; it was filed on April 22, 1993. It sought no extension of time.

[3] The failure of the state courts to consistently apply the rule of silent acquittals is an independent due process violation as argued in the Petition for Writ of Certiorari at 12.

Court held that Schiro's double jeopardy claim was without merit because, under state law, a silent verdict does not equal an acquittal for double jeopardy purposes:

> Since the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen. Therefore, this double jeopardy claim must fail.

Schiro v. Clark, 963 F.2d 962, 970 (7th Cir. 1992).

Respondent now argues that relief is barred for four reasons:

> 1. Under both state and federal law, the jury's silence on one count did not amount to an acquittal because the multiple counts were charges of the same offense.
>
> 2. Under state law jeopardy does not attach until sentence is pronounced.
>
> 3. Schiro waived his collateral estoppel claim and is not entitled to relief on the merits.
>
> 4. This case fails to present a "cert. worthy" issue.

A. Under both state and federal law this jury's silence on one count amounted to an implicit acquittal

1. The single case cited by Respondent in support of its state law proposition is not relevant.

Respondent argues this case presents an exception to the general state rule that a jury's silence amounts to an acquittal because the rule does not apply when "multiple counts were merely different charges of the same offenses." Brief in Opposition at 11, quoting Cichos v. State, 246 Ind. 680, 208 N.E.2d 685 (1965), cert. dismissed as improvidently granted in Cichos v. Indiana, 385 U.S. 76 (1976).

Cichos was charged with reckless homicide and involuntary manslaughter. Both the state supreme court and this Court found

that these offenses required proof of the same elements to sustain a conviction. The only difference between the two was the penalty. Cichos was convicted of reckless homicide (the offense carrying the lesser punishment); the jury was silent on the manslaughter count. His conviction was reversed on appeal, he was retried on both counts and was reconvicted of reckless homicide. On appeal, Cichos argued that the jury's silence in the first trial on the manslaughter count constituted an acquittal of both counts, thus prohibiting retrial on either count.

The state supreme court rejected the jeopardy claim holding: (1) both crimes had the same elements and Cichos was convicted of one of them at the first trial; (2) the jury was specifically told that it should return only one verdict. This Court then stated: "In light of the Indiana statutory scheme and the rulings of the Indiana Supreme Court in this case, we cannot accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter and that the second trial therefore placed him twice in jeopardy." Cichos v. Indiana, 385 U.S. 76, 80.

Unlike Cichos, the statutes at issue here define two separate and distinct offenses. The Indiana Supreme Court stated in Schiro's case: "[t]he crimes of murder and felony murder each contain elements that are different from the other but are equal in rank." Schiro v. State, 533 N.E.2d 1201, 1208 (1989).

The elements of murder and felony murder (I.C. 35-42-1-1) are:

Murder	***"Felony Murder"***
1. Knowingly or intentionally	1. *(No mental state required)*
2. Kills another person	2. Kills Another person
3. *(No proof of additional elements required)*	3. While committing or attempting to commit: arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery.

Thus, the Indiana Supreme Court was correct when it held that each offense contains elements which the other does not.[4]

2. The jury's silence on the *mens rea* murder and felony murder (criminal deviate conduct) constituted an acquittal

Respondent asserts that pursuant to federal law "murder" and "felony murder" under I.C. 35-42-1-1(1) and (2) are not separate crimes, but are merely "different theories".[5] As noted above, "murder" and "felony murder" are separate crimes. In support, Respondent cites United States ex rel. Jackson v. Follette, 462 F.2d 1041 (2d Cir), cert. denied, 409 U.S. 1045 (1972). Respondent attempts to bolster this position, citing to Poland v. Arizona, 476

---

[4] Mens rea murder requires proof that the accused acted with an intent to kill, while felony murder does not require any intent to kill but does require proof that the person acted with the intent to commit the underlying felony. The felony murder offense additionally requires proof that the accused committed an underlying felony.

[5] Even if murder and felony murder are different theories of the same offense, Respondent's claim is unavailing. Green v. United States, 355 U.S. 184 (1957) (defendant entitled to relief where he was convicted of "malice murder" and jury was silent as to murder in course of felony even though both offenses brought under one count); Wilson v. Meyer, 665 F.2d 118 (7th Cir. 1981)(rejecting "different theories" of one offense as defense to double jeopardy claim).

As further support, Respondent contends that a single guilt phase verdict form listed all three charged counts. Brief of Opposition at 2. In fact, three separate "guilty" verdict forms were provided: one for each count. Schiro v. State, 451 N.E.2d 1047, 1062 (Ind. 1983).

U.S. 147 (1986), by claiming that one cannot be "acquitted" of a particular aggravating circumstance. Brief in Opposition at 13-15.

a. Jackson: Jackson has nothing to do with the issues at bar -- he was not "acquitted" on any charge. Jackson faced charges of premeditated and felony murder. His jury was told, without objection, that "if it returned a verdict on one count it was to remain silent on the other." Id. at 1043. At his first trial, he was convicted of premeditated murder. After a grant of *habeas corpus* relief, he was retried on both counts and found guilty of felony murder (the jury was again silent as to the premeditated murder). Double jeopardy did not bar his conviction for felony murder. There was no "acquittal" in trial one: the jury was instructed to return a single verdict -- there was no resolution of the factual predicates necessary to support a conviction for felony murder. The exact opposite is true here.[6]

b. "Acquittal" of the aggravating circumstance: Respondent claims that Schiro cannot be "acquitted" of the aggravating

[6] Each mental health professional who testified at trial, including Court's and State's experts, determined that Schiro suffered from a mental illness, although they generally disagreed as to the appropriate diagnosis and severity of the illness. From these facts, the jury could likely have concluded that the State failed to prove that Schiro "knowingly" killed. Regardless of the jury's reasoning for its verdict, "[t]he jury is the trier of fact and may attach whatever weight and credibility to the evidence which they believe is warranted." Sayles v. State, 513 N.E.2d 183, 188 (Ind.App. 1986). Given the verdict forms available to Schiro's jury, there was no other way for the jury to indicate that it found Schiro not guilty on the *mens rea* murder. See Schiro's Petition for Writ of Certiorari at 9-10.

A misstatement made by Respondent in its Brief in Opposition is relevant here. Respondent suggests that Schiro "attempted to fool the jury into thinking he was mentally disturbed by rocking in his chair whenever they were in the courtroom. The trial judge, who observed that this behavior stopped when the jury was out, was not fooled." Brief in Opposition at 2, n. 1. Through the testimony of numerous State's witnesses, the jury was informed that Schiro sometimes "rocked" and at other times did not [TR. 966, 993, 1087-88, 1109].

circumstance. It bases this claim on Poland, supra. Poland claimed that events occurring at his *sentencing* proceeding barred imposition of the death penalty.

Unlike Poland's case, the dispositive events here occurred at the *guilt phase*. It was at the *guilt phase* when the jury determined that Schiro was guilty of felony murder (rape) and not guilty of the *mens rea* murder and felony murder (criminal deviate conduct). It was the *guilt phase acquittals* that barred *further factual proceedings*.[7]

This distinction was addressed by the 11th Circuit in Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), *rhrg. den.*, 898 F.2d 160, *cert. den.*, 110 S.Ct. 2628. In Delap's first trial, he was convicted of a *mens rea* murder, but acquitted of felony murder. At resentencing, the jury was permitted to consider, in aggravation, that the murder was committed in the course of a felony. The sentencer found as aggravating that the crime "was committed while the defendant was engaged in the commission of a kidnapping, robbery and rape." Id. at 306. The 11th Circuit held:

> [I]n this case Delap's acquittal of felony murder occurred during the *guilt/innocence* phase of his first trial. Thus, we need not address what collateral estoppel effect, if any, would result had the jury at the sentencing phase of Delap's first trial concluded that he had not committed murder during the course of a felony. (footnote omitted) Here, we have a conclusive and final judgment in the *guilt/innocence* phase that Delap was not guilty of felony murder. Therefore, the concern of the

[7] "Cases such as Arizona v. Rumsey and United States v. Martin Linen Supply Co. demonstrate that 'acquittals' continue to receive a special degree of finality." United States ex rel. Young v. Lane, 768 F.2d 834, 841 (7th Cir. 1985).

> Poland Court that capital sentencing proceedings would be transformed into "minitrials" on each aggravating and mitigating factor (citation omitted), simply is irrelevant in this case, because the acquittal in question took place at the guilt/innocence phase of his first trial.

Id. at 318-319.

Like Delap, Schiro was acquitted of the aggravators at the guilt phase and the death sentence is barred.

B. Jeopardy attaches before sentencing under state law

Respondent claims that double jeopardy concerns are not implicated in bifurcated proceedings and that double jeopardy only applies to resentencings. Brief in Opposition at 12.

1. Double jeopardy concerns may be implicated in a single proceeding: Contrary to Respondent's claim, Indiana Courts have recognized double jeopardy claims arising from a single proceeding. In Tinker v. State, 549 N.E.2d 1065 (Ind.App. 1990), the defendant was charged with robbery, a Class B felony. The court convicted Tinker of robbery as a Class C felony. Before sentencing, the State asked the court to make additional fact findings and enter judgment of conviction for the charged class B felony. The court complied and sentenced Tinker on the class B. On appeal, the Court held that by finding Tinker guilty of the Class C felony it had acquitted on the Class B felony. "Therefore it is of no consequence whether T.R. 52(B) would allow the trial court to amend its judgment or that the amendment occurred before sentencing and entry of a final judgment because the result, under either alternative, violated Tinker's protection against double jeopardy." Id. at 1067.

Respondent argues that Bullington v. Missouri, 451 U.S. 430

(1981) and Arizona v. Rumsey, 467 U.S. 203 (1984) are limited to resentencing proceedings. Brief in Opposition at 12. It is true that both cases concerned whether resentencing proceedings could constitutionally be held. That is so, because in both cases the defendants were "acquitted" at the *penalty* phase. Respondent ignores the basis of those holdings; ie. that the penalty phase was "*itself a trial* on the issue of punishment...." Bullington at 439. Respondent states that the concerns of embarrassment, anxiety, and expense are not implicated by a first penalty phase. Respondent ignores the following from Bullington: "the 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." Id. at 446.

2. Respondent incorrectly asserts that jeopardy attaches at sentencing: Respondent contends that Schiro has overlooked "the settled principle that a judgment of conviction does not become final until the defendant is sentenced." Brief in Opposition at 12. The cases cited by Respondent concern when a conviction becomes final **for purposes of appeal** and are simply irrelevant. Green v. United States, supra at 188 ("it has been settled under the Fifth Amendment that a *verdict* of acquittal is final, ending a defendant's jeopardy and *even when 'not followed by any judgment*, is a bar to a subsequent prosecution...'" (citation omitted, emphasis added)

Clearly, the jury rendered its *verdict* at the close of the

guilt phase. The trial court would have had no authority to enter judgment of conviction on the counts for which the jury had remained silent and was likewise barred from proceeding to the penalty phase where the state was given a second opportunity to prove beyond a reasonable doubt that Schiro was guilty of those offenses. Fong Foo v. United States, 369 U.S. 141 (1962); Carpenters v. United States, 330 U.S. 395 (1947); Harris v. State, 508 N.E.2d 834 (Ind.App. 1987).

"[W]hat constitutes and 'acquittal' is not to be controlled by the form of the [factfinder's] action." United States v. Martin Linen Supply Co., 430 U.S. 564, 576 (1977) (other citations omitted). Rather, in determining what constitutes an "acquittal", this Court must look to "whether the ruling of the [factfinder], whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Id.

C. Schiro has not waived his collateral estoppel claim and is entitled to relief under the doctrine

1. No waiver has taken place: Respondent contends that Schiro waived his collateral estoppel claim by not previously raising it. It correctly cites to a footnote in the Circuit Court opinion. Schiro v. Clark, 963 F.2d at 970, n. 7. However, this claim *has* been previously presented:

> The case proceeded to the guilt (sic) phase with the state given another opportunity to prove beyond a reasonable doubt that Schiro intentionally killed Laura Leubbeheusser (sic). Thereafter, the jury returned a unanamous (sic) verdict recommending against the imposition of the death penalty. As the Court is well aware, the trial judge overrode the jury's unanamous (sic)

> verdict against the death penalty and imposed a sentence of death. Schiro contends this was a violation of the double jeopardy prohibition. *This issue specifically contends that the doctrine of collateral estoppel was violated.*

Brief and Short Appendix of Appellant Thomas Schiro, filed in the Circuit Court on July 18, 1991, pg. 16 (emphasis added).[8]

2. Collateral estoppel bars the death sentence: Respondent argues that collateral estoppel does not bar imposition of the death penalty for two reasons: (1) the jury's consideration of whether Schiro knowingly killed did not include consideration of whether he intentionally killed; (2) the jury's verdict on guilt was not a "final judgment" because sentence had not yet been imposed. Brief in Opposition at 17.

The first argument was addressed in Schiro's Petition for Writ of Certiorari at 13-14. Regarding the second argument, Schiro incorporates his argument supra at p. 8. See also Delap, supra.[9]

D. There are Important Reasons to Grant the Writ

Respondent contends that this Court should not grant the writ and expend its limited resources to consider this case because it

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[8] In its reply brief to the Circuit Court, Respondent did not claim that Schiro failed to previously raise the collateral estoppel claim. Indeed, such a claim would have been unavailing since Schiro has consistently pressed the doctrine of collateral estoppel as support for the claim presented herein.

In his brief to the Indiana Supreme Court concerning this issue, Schiro contended: "Because the accused was acquitted of the intentional killing of Luebbehusen, *the doctrine of collateral estoppel* barred the Court from proceeding to the second phase of the proceedings." Brief of Appellant, filed in the Indiana Supreme Court August 22, 1988, pp. 54-5 (emphasis added).

[9] At p. 17 of the Brief in Opposition, Respondent cites to Tison v. Arizona, 481 U.S. 137 (1987). Tison is totally irrelevant to Schiro's case: Tison addresses whether the 8th Amendment precludes imposition of the death penalty given the defendant's participation in the crime (ie. whether the defendant is "eligible" for the death penalty given his participation).

presents a unique set of facts for which there is no split among the lower courts. Recognizing the limited resources of this Court, Schiro respectfully urges this Court to accept certiorari. There is a split among the circuits on this issue. Delap, supra (habeas petitioner entitled to relief where at a prior trial he was acquitted of felony murder and sentencer relied upon felony murder as aggravating factor to support death sentence). The Circuit Court opinion in this case conflicts with Delap. Thus, Schiro has established an important consideration meriting review by this Court. U.S. Sup. Ct. R. 10.1(a).

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 91-1509

THOMAS SCHIRO,	)	Appeal from the United States
	)	District Court for the Northern
Petitioner-Appellant,	)	District of Indiana,
	)	South Bend Division
v.	)	No. 83 C 588
	)	
RICHARD CLARK, Superintendent,	)	The Honorable
Indiana Attorney General,	)	Allen Sharp,
	)	Chief Judge.
Respondents-Appellees.	)	

MOTION TO ACCEPT PETITION FOR REHEARING IN BANC INSTANTER

Thomas Schiro, by counsel, moves this Court to accept his Petition for Rehearing In Banc Instanter. In order to sustain his request, Mr. Schiro presents the following:

1. That this Court entered its Judgment in the above-entitled cause on May 8, 1992.

2. Pursuant to Fed. R. App. P. 35 and 40, Mr. Schiro filed his Petition for Rehearing and Suggestion for Rehearing In Banc on May 22, 1992, by mail.

3. Through contact with the Clerk of this Court, counsel learned that the above Petition was not received. Counsel has been in constant contact with the Clerk of this Court.

4. On August 4, 1992, counsel was struck as a pedestrian by a motor vehicle, and sustained serious injuries, further delaying a second mailing of the Petition.

5. Because Mr. Schiro faces a sentence of death, and because the delay in the filing of his Petition for Rehearing is not attributable in any way to himself, Mr. Schiro respectfully requests that this Court accept his Petition for Rehearing and that his cause be reheard In Banc.

WHEREFORE, Thomas Schiro, prays that his Motion be sustained and for all additional appropriate relief.

Respectfully submitted,

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Attorney I.D. #1840-49

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly served upon the Attorney General's Office of the State of Indiana upon the date of filing same.

Alex R. Voils, Jr.

(5)

No. 92-7549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS N. SCHIRO,

Petitioner,

v.

RICHARD CLARK, Superintendent,
Indiana State Prison, *et al.*

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 5, 1993
CERTIORARI GRANTED MAY 17, 1993**

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RELEVANT DOCKET ENTRIES

DATE	ENTRY
10 February 1981	Information filed.
9 April 1981	State files Count IIA and Count IIIA (Requests for the death penalty).
16 April 1981	Schiro files motion to interpose the defense of insanity.
21 April 1981	Venue moved from Vanderburgh Circuit Court to Brown Circuit Court.
2 September 1981	Voir dire commences.
12 September 1981	Jury retires at 2:15 and returns verdict at 7:15 p.m. finding Schiro guilty of felony murder during the commission or attempted commission of a rape. The jury is instructed to return on September 15, 1981 at 1:00 p.m. for the penalty phase.
15 September 1981	Evidence from guilt phase incorporated for purposes of penalty phase. Jury retires at 1:47 p.m. and returns recommendation against death at 2:48 p.m.
2 October 1981	Trial court overrides jury recommendation and imposes death penalty.
11 February 1983	Indiana Supreme Court remands case to the trial court for a statement of reasons imposing the death penalty.
22 February 1983	Trial court files nunc pro tunc entry with Indiana Supreme Court as to reasons for imposition of death penalty.
5 August 1983	Indiana Supreme Court affirms conviction and death sentence on direct appeal.
28 June 1985	Indiana Supreme Court affirms denial of first state post-conviction relief petition.

DATE	ENTRY
15 January 1988	Trial court denies second state petition for post-conviction relief.
8 February 1989	Indiana Supreme Court affirms denial of second state petition for post-conviction relief.
26 December 1990	District Court denies habeas corpus relief.
4 February 1991	Schiro files Notice of Appeal and Motion to File Instanter in the District Court.
5 March 1991	District Court grants Certificate of Probable Cause.
8 May 1992	Court of Appeals affirms the denial of habeas corpus relief.
1 June 1992	Court of Appeals issues mandate.
18 August 1992	Schiro files Motion to Recall Mandate and Accept Petition for Rehearing Instanter.
25 August 1992	Court of Appeals grants Motion to Accept Petition for Rehearing Instanter; Court of Appeals denies Motion to Recall Mandate.
8 September 1992	Court of Appeals denies rehearing and suggestion for rehearing en banc.

VANDERBURGH CIRCUIT COURT
(NCT)

1981 TERM

No. 3101

STATE OF INDIANA

vs.

THOMAS N. SCHIRO

INFORMATION FOR COUNT I: MURDER

State of Indiana, Vanderburgh County, ss:

DONALD ERK being duly sworn upon his oath says that THOMAS N. SCHIRO on or about the 5th day of February A.D., 1981, at said County and State as affiant verily believes: did knowingly kill Laura Luebbehusen by beating, striking and strangling the said Laura Luebbehusen, thereby causing her to die by asphyxiation, all in violation of I.C. 35-42-1-1(1).

Then and there being contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Donald Erk

(Affirmation Omitted in Printing)

INFORMATION FOR COUNT II: MURDER

State of Indiana, Vanderburgh County, ss:

DONALD ERK being duly sworn upon his oath says that THOMAS N. SCHIRO on or about the 5th day of February A.D., 1981, at said County and State as affiant verily believes: did kill Laura Luebbehusen by beating, striking and strangling the said Laura Luebbehusen, thereby causing her to die by asphyxiation, while the said Thomas N. Schiro was committing and attempting to commit the crime of rape, to-wit: knowingly and by the use of force and the threat of force, having sexual intercourse with the said Laura Luebbehusen, a member of the opposite sex, without the consent of the said Laura Luebbehusen, all in violation of I.C. 35-42-1-1(2).

Then and there being contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Donald Erk

(Affirmation Omitted in Printing)

INFORMATION FOR COUNT III: MURDER

State of Indiana, Vanderburgh County, ss:

DONALD ERK being duly sworn upon his oath says that THOMAS N. SCHIRO on or about the 5th day of February A.D., 1981, at said County and State as affiant verily believes: did kill Laura Luebbehusen by beating, striking and strangling the said Laura Luebbehusen, thereby causing her to die by asphyxiation, while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct, to-wit: knowingly causing Laura Luebbehusen to submit to deviate sexual conduct, to-wit: knowingly and by the use of force and threat of force cause penetration, by an object, of the sex organ of the said Laura Luebbehusen, all in violation of I.C. 35-42-1-1(2).

Then and there being contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Donald Erk

(Affirmation Omitted in Printing)

VANDERBURGH CIRCUIT COURT

(Caption Omitted in Printing)

CHARGING INFORMATION FOR DEATH PENALTY

(Filed April 9, 1981)

COUNT IIA—DEATH SENTENCE

The crime of Murder, as charged in Count II of the Information filed herein, was committted by the defendant, Thomas N. Schiro, and the following aggravating circumstances exist, which justify the imposition of the death sentence.

1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information, constituting an aggravating circumstance justifying imposition of the death penalty, as set forth in I.C. 35-50-2-9(b)(1).

WHEREFORE, the State of Indiana prays that the Penalty of Death be imposed on the defendant, Thomas N. Schiro.

/s/ Robert J. Pigman
ROBERT J. PIGMAN
Chief Deputy Prosecuting Attorney

(Affirmation Omitted in Printing)

COUNT IIIA—DEATH SENTENCE

The crime of Murder, as charged in Count III of the Information filed herein, was committed by the defendant, Thomas N. Schiro, and the following aggravating circumstances exist, which justify the imposition of the death sentence.

1) The murder of Laura Luebbehusen charged in Count III was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Criminal Deviate Conduct, as more particularly described in the Information, constituting an aggravating circumstance justifying imposition of the death penalty, as set forth in I.C. 35-50-2-9(b)(1).

WHEREFORE, the State of Indiana prays that the Penalty of Death be imposed on the defendant, Thomas N. Schiro.

/s/ Robert J. Pigman
ROBERT J. PIGMAN
Chief Deputy Prosecuting Attorney

(Affirmation Omitted in Printing)

IN THE BROWN CIRCUIT COURT

Cause No. 81 CR 243

STATE OF INDIANA

v.

THOMAS N. SCHIRO

STATE'S TENDERED INSTRUCTION SEVEN (7)

PLAINTIFF'S FINAL INSTRUCTION NO. ——

An [voluntarily]* intoxicated person is responsible for his criminal conduct unless his intoxication renders him incapable of acting with the required specific intent.

Given

Refused X

Given as modified

[* As added by the trial court before the instruction was refused.]

PORTION OF INSTRUCTION CONFERENCE

* * * *

The Defendant would object to the Plaintiff's Final Instruction Number Seven, which reads, "a voluntarily intoxicated person is responsible for his criminal conduct unless his intoxication renders him incapable of acting with the required specific intent." for the reason that it is an incomplete statement in that the Court, or the instruction does not then instruct the jury as to what specific intent, if any, is required in defense . . . in charges of this nature, and therefore is in addition confusing to the jury as to the meaning of that instruction and how it should apply to the facts and charges of this particular case.

THE COURT: You're talking about the prosecution's seven?

MR. KEATING: Yes, and I hope I correctly numbered that. I've . . . you said they were in sequence . . .

THE COURT: I just want to . . . which one that is.

MR. KEATING: Your Honor, it's the one which says . . . starts a "voluntarily intoxicated person" . . .

THE COURT: That was given as modified.

MR. KEATING: Correct.

THE COURT: I'm going to . . . on that Number Seven, I'm going to reverse my former ruling and I'm going to refuse it, Mr. Atkinson. That's on the question of an intoxicated person.

MR. ATKINSON: You are refusing?

THE COURT: Yes.

MR. ATKINSON: Thank you.

THE COURT: Alright, I have refused that. Now, do you want to . . .

MR. KEATING: You are refusing it?

THE COURT: Yes.

MR. KEATING: Well, that takes care of that one.

* * *

PRELIMINARY INSTRUCTIONS AT THE GUILT PHASE

COURT'S PRELIMINARY INSTRUCTION NO. 1

MEMBERS OF THE JURY:

You have been selected as jurors and have taken an oath to well and truly try this cause. It may take hours for you to hear all of the evidence and the arguments of counsel.

During the progress of the trial there will be periods of time during which you will be allowed to separate, such as recesses for rest periods, for meals and overnight. During those periods of time that you are outside the courtroom and are permitted to separate, you must not talk about this cause among yourselves or with anyone else.

During the trial, do not talk to any of the parties, their lawyers or any of the witnesses.

If any attempt is made by anyone to talk to you concerning the matters here under consideration, you should report that fact to the Court immediately.

There may be publicity in newspapers, on radio or possibly on television concerning this trial. You should not read or listen to these accounts but should confine your attention to the Court proceeding, listen attentively to the evidence as it comes from the witnesses, and reach a verdict solely upon what you hear and see in this Court.

You should keep an open mind. You should not form or express an opinion during the trial and should reach no conclusion in this cause until you have heard all of the evidence, the arguments of counsel, and the final instructions as to the law which will be given to you by the Court.

This is a Criminal Case brought by the State of Indiana against Thomas N. Schiro. This Case has been venued

from Vanderburgh County to Brown County and was commenced by the filing on February 5, 1980 of an information for Murder, Counts I, II, III. On April 9, 1981 in the Circuit Court there was filed Count IIA and Count IIA, Death Sentence in this Case.

35-42-1-1 Murder

Sec. 1. A person who:

(1) Knowingly or intentionally kills another human being; or

(2) Kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony.

35-50-2-9 Death sentence

Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

* * * *

(5) The defendant commited the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As added by Acts 1977, S.84, SEC. 122, eff. October 1, 1977.*

Preliminary Instructions

The defendant has entered a plea of not guilty and special plea of not responsible by reason of insanity.

The burden rests upon the State of Indiana to prove to each of you beyond a reasonable doubt, each and every essential element of the charge contained in the information.

On the issue of insanity, the burden rests upon the defendant to prove to each of you by a preponderance of the evidence that he was not sane at the time of the offense charged.

The charge which has been filed is the formal method of bringing the defendant to trial.

The fact that a charge has been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.

1.13 INFORMATION OR INDICTMENT—NOT EVIDENCE—INSANITY

The defendant has entered a plea of not guilty and special plea of not responsible by reason of insanity.

The burden rests upon the State of Indiana to prove to each of you beyond a reasonable doubt, each and every essential element of the charge contained in the information.

On the issue of insanity, the burden rests upon the defendant to prove to each of you by a preponderance of the evidence that he was not sane at the time of the offense charged.

The fact that a charge has been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.

1.15 INSANITY—DEFENSE I.C. 35-41-3-6

Insanity is a defense to the crime charged. The legal defense of insanity is defined as follows:

A person is not responsible for criminal conduct if at the time of such conduct as the result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

COURT'S PRELIMINARY INSTRUCTION NO. 3

The information in this case is the formal method of accusing the Defendant of a crime and placing him on trial. It is not any evidence against the Defendant and does not in any way show his guilt.

COURT'S PRELIMINARY INSTRUCTION NO. 4

In this case, you must presume that the Defendant is innocent, and you must continue to believe he is innocent, step by step, through the trial until the State proves by the evidence to be presented, that the Defendant is guilty beyond a reasonable doubt.

Since the Defendant is presumed to be innocent, he is not required to prove or explain anything. The real burden of proving guilty beyond a reasonable doubt rests now and throughout the entire trial on the State.

If the State fails to prove beyond a reasonable doubt every essential element of the crimes charged, or if it fails beyond a reasonable doubt every essential element of any lesser crimes included in the crimes charged, or if there remains in your mind a reasonable doubt about the Defendant's guilt, you must find him not guilty.

COURT'S PRELIMINARY INSTRUCTION NO. 5

A reasonable doubt is an actual and substantial doubt that arises in the mind after a fair and impartial consideration and weighing of all the evidence and circumstances in the case. Not every doubt is a reasonable one. In order that there can be such doubt, it must be based upon some reason arising out of the evidence or lack of evidence concerning the (essential) (necessary) elements of the case. You may not act upon a mere whim, speculation, guess, or surmise and you may not convict upon a mere possibility of guilt. Before you can find the Defendant guilty as charged, the evidence in the case must produce in your own mind such a firm belief of guilt, that you would be freely willing to act upon that belief in any matter of the highest concern and importance to your own dearest interest.

This rule on reasonable doubt applies to each of you individually; and it is your personal duty to refuse to convict as long as you have a reasonable doubt as to the Defendant's guilt as charged; likewise, it is your personal duty to vote for conviction, as long as you are convinced beyond a reasonable doubt, of the Defendant's guilt as charged.

COURT'S PRELIMINARY INSTRUCTION NO. 6

In considering the evidence in this cause, you are permitted to draw reasonable inferences from the facts proved. A reasonable inference is one which naturally flows from the facts proved.

COURT'S PRELIMINARY INSTRUCTION NO. 7

Facts in a criminal prosecution may be established and proved by circumstances as well as by direct evidence.

Circumstantial evidence is the proof of such facts and circumstances, connected with, and surrounding the commission of the crime charged, from which inferences may be drawn which tend to show the guilt or innocence of the person charged, and if the inferences thus drawn are sufficient to satisfy the minds of the jury beyond a reasonable doubt, of the existence of the facts sought to be established, then such facts would be sufficiently proven and the jury would be justified in acting thereon in the rendition of their verdict.

Before the inferences can be properly drawn from circumstances, the circumstances themselves should be established to the satisfaction of the jury. In a criminal case the Defendant may be convicted upon circumstantial evidence alone, or upon circumstantial and direct evidence combined. It is the duty of the jury in rendering the verdict to consider all the evidence in the case, whether it be circumstantial or direct, for the purpose of determining the guilt or innocence of the Defendant, keeping in view the fact, that in order to convict, the Defendant must be proved guilty beyond a reasonable doubt.

COURT'S PRELIMINARY INSTRUCTION NO. 8

You are the sole judges of the credibility of all the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe; his age; his memory, manner, and conduct while testifying; any interest, bias, or prejudice he may have; his relationships with other witnesses or the Defendant; and the reasonableness of his testimony considered in the light of all the evidence on the case.

COURT'S PRELIMINARY INSTRUCTION NO. 9

If it can be reasonably done, you should fit the evidence in this case to the presumption that the Defendant is innocent and that every witness is telling the truth. You have the right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified, but you should not disregard the testimony of any witness without careful consideration and without just cause.

However, if you find so much conflict in the testimony of the witness that you cannot believe all their testimonies, then you are permitted to determine what or whom you will or will not believe.

In weighing the testimony to make that determination, the number of witnesses who have testified on different sides of an issue or the quantity of evidence introduced on one side or the other, is not necessarily of the greater weight. The evidence given upon any fact in issue which convinces you most strongly of its truthfulness, is the greater weight.

COURT'S PRELIMINARY INSTRUCTION NO. 10

During the trial, certain exhibits may be offered in evidence. When admitted into evidence by the Court, each of you should carefully examine these exhibits, without discussion, at the time they are submitted to you. The exhibits will not be sent to the jury room with you when you retire to deliberations.

COURT'S PRELIMINARY INSTRUCTION NO. 11

It is necessary now that you understand how the trial is to proceed.

First, the attorneys will have an opportunity to make opening statements to you. These opening statements are not evidence and are made by the attorneys only to acquaint you with the facts they expect to prove. They are to be considered only as a guide so you may better understand and evaluate the evidence as it comes to you.

Following the opening statements witnesses will be called to testify. They will be placed under oath and then examined and cross examined by the attorneys. Documents and other tangible exhibits may also be produced as evidence.

When the evidence is completed, the attorneys will argue the merits of the case. What the attorneys say is not evidence. Their arguments are given to assist you in evaluating the evidence and in arriving at correct conclusions concerning the facts, but they are also intended to persuade you to a particular verdict; and those arguments may be accepted or rejected as you see fit.

Finally, just before you retire to consider your verdict, the Court will instruct you on the law applicable to the case.

Dated at ———, Indiana, this ——— day of ——, 19—.

———————————

Judge

FINAL INSTRUCTIONS AT GUILT PHASE

(Filed Mar. 1, 1982)

FINAL INSTRUCTION 1

You are to consider all the instructions as a whole and are to regard each with the others given to you. Do not single out any certain sentence or any individual point or instructions and ignore the others.

FINAL INSTRUCTION 2

Since this is a criminal case the Constitution of the State of Indiana makes you the judges of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.

FINAL INSTRUCTION 3

The defendant has entered a plea of not guilty and special plea of not responsible by reason of insanity.

The burden rests upon the State of Indiana to prove to each of you beyond a reasonable doubt, each and every essential element of the charge contained in the indictment.

On the issue of insanity, the burden rests upon the defendant to prove to each of you by a preponderance of the evidence that he was not sane at the time of the offense charged.

The charge which has been filed is the formal method of bringing the defendant to trial.

The fact that a charge has been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.

FINAL INSTRUCTION 4

The Indiana Statutes defining the offenses charged, including the elements contained therein, insofar as they are applicable, reads as follows:

MURDER

"A person who:

(1) Knowingly or intentionally kills another human being . . . or,

(2) Kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery, . . .

commits murder, a felony."

The term "human being" means a person who was born and was alive.

FINAL INSTRUCTION 5

A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

FINAL INSTRUCTION 6

Insanity is a defense as to the crimes charged. The legal defense of insanity is defined as follows:

A person is not responsible for criminal conduct if at the time of such conduct as the result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

FINAL INSTRUCTION 7

The term "mental disease" generally is used to denote a condition capable of either improving or deteriorating.

The term "mental defect" generally is used to denote a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

FINAL INSTRUCTION 8

To sustain the charge of murder, the State must prove the following proposition:

First:

That the defendant engaged in the conduct which caused the death of Laura Luebbehusen;

Second:

That when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, and that the defendant was not insane at the time of the murder, then you should find the defendant guilty.

FINAL INSTRUCTION 9

In reaching your decision on whether the defendant, Thomas N. Shiro, is guilty, not guilty, or not responsible by reason of insanity at the time of the offense, you must base your decision upon the evidence presented, without concern for the consequences of such decision. The procedure that would follow if there is a verdict of not responsible by reason of insanity at the time of the offense cannot properly motivate you in reaching your decision.

FINAL INSTRUCTION 10

EVIDENCE IN GENERAL

12.33 DATE OF CRIME CHARGED I.C. 35-3.1-1-2

The information states that the crime charged was committed (or or about) Feb. 5, 1981. If you find that the crime charged was committed, the State is not required to prove that it was committed on that particular date.

NOTE: This instruction should be given only when there is a variance between the date alleged in the indictment or information and the evidence, and all dates are within the period of limitations.

FINAL INSTRUCTION 11

Under the law of this State, a person charged with a crime is presumed to be innocent. To overcome the presumption of innocence, the State must prove the de-

fendant guilty to each essential element of the crime charged, beyond a reasonable doubt.

The defendant is not required to present any evidence to prove his innocence. However, in this case the defendant has the burden of proving he was insane at the time of the act charged, by a preponderance of the evidence.

The term "preponderance of the evidence" means the weight of the evidence. The evidence as to the issue of insanity which convinces you most strongly of its truthfulness is of greater weight.

FINAL INSTRUCTION 12

A "reasonable doubt" is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.

If, after considering all of the evidence, you have reached a firm belief in the guilt of the defendant that you would feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you, then you will have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.

The rule of law which requires proof of guilt beyond a reasonable doubt applies to each juror individually. Each of you must refuse to vote for conviction unless you are convinced beyond a reasonable doubt of the defendant's guilt. Your verdict must be unanimous.

FINAL INSTRUCTION 13

You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonable-

ness of the testimony of the witness considered in the light of all of the evidence in the case.

You should attempt to fit the evidence to the presumption that the defendant is innocent and the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony you must determine which of the witnesses you will believe and which of them you will disbelieve.

In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. The number of witnesses who testify to a particular fact, or the quantity of evidence on a particular point need not control your determination of the truth. You should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

FINAL INSTRUCTION 14

Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts.

It is not necessary that facts be proved by direct evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

FINAL INSTRUCTION 15

Motive is that which prompt a person to act. The State is not required to prove a motive for the commission of the crime charged.

FINAL INSTRUCTION 16

If the jury returns a verdict of not guilty by reason of insanity you are instructed that the law provides that the court shall initiate and conduct a mental competency hearing to determine whether the defendant shall be transferred to the care and custody of the Department of Mental Health for civil commitment proceedings.

FINAL INSTRUCTION 17

Experts have testified as to their findings and opinions as to the mental condition of the defendant. You should consider the expert testimony in light of all other testimony presented concerning the development. adaptation and functioning of the defendant's mental and emotional processes and behavior controls and not necessarily accept the ultimate conclusions of the experts as to the defendant's legal sanity or insanity.

You must decide the extent of the defendant's mental disability from a consideration of all of the evidence relating to such disability.

FINAL INSTRUCTION 18

During the progress of the trial, certain questions were asked and certain exhibits were offered which the court ruled not admissible into evidence. You must not concern yourselves with the reasons for the rulings since the production of evidence is strictly controlled by rules of law.

You must not consider an exhibit or testimony which the Court ordered stricken from the record. In fact, such matter is to be treated as though you had never heard of it.

Nothing that I have said during the trial is intended as any suggestion of what facts or what verdict you should find. Each of you, as jurors, must determine the facts and the verdict.

FINAL INSTRUCTION 19

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

FINAL INSTRUCTION 20

It is necessary, from this time until you are discharged by the Court, that you remain together, and in charge of the officer detailed for that purpose. You must not communicate on any subject whatsoever with any person other than members of this Jury, except to answer such questions as may be asked of you by the officer by direction of this Court. If at any time you have any desire to communicate with the Court, you may notify the officer to that effect and he will communicate with me.

FINAL INSTRUCTION 21

The court is submitting to you forms of possible verdicts you may return in this case.

These forms will be supplied to you when you retire to the jury room for deliberation. Upon retiring to the jury room, you will select one of your members as a

foreman. The foreman will preside over your deliberations and must sign and date the verdict(s) to which you all agree. The foreman must return all verdict forms into open court.

PLAINTIFF'S FINAL INSTRUCTION NO. 3

Medical insanity is not the same as "legal insanity" as a bar to criminal prosecution.

CITATION:

Marx v. State, 236 Ind. 455.

Given ✔

Refused ———

Given as Modified: ———

PLAINTIFF'S FINAL INSTRUCTION NO. 5

A lay witness may express an opinion on the question of sanity or insanity of the defendant if a factual basis for observation has been stated.

CITATION:

Cockrum v. State, 243 N.E. 2d 479 (1968).

Grubb v. State, 117 Ind. 277.

Given ✔

Refused ———

Given as Modified: ———

PLAINTIFF'S FINAL INSTRUCTION NO. 9

The Jury has the right to accept or reject any or all of the testimony of witnesses, either expert or lay witnesses, on the question of insanity. You are not required to necessarily accept the ultimate conclusions of the experts as to the defendant's legal sanity or insanity. The opin-

ions of experts may be considered along with all of the other evidence relating to that question.

CITATION:

Johnson v. State, 1970, 264 N.E. 2d 57.

Given ✔

Refused ———

Given as Modified: ———

DEFENDANT'S INSTRUCTION NO. 1

You are instructed that the offense of Rape is defined as follows:

"A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:

(1) The other person is compelled by force or imminent threat of force;

(2) * * *

(3) * * *

commits, rape * * *"

The term "sexual intercourse" means an act that includes any penetration of the female sex organ by the male sex organ.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 2

You are instructed that the offense of Criminal Deviate Conduct is defined as follows:

"A person who knowingly or intentionally causes penetration, by an object or any other means, of the sex organ or anus of another person when:

(1) The other person is compelled by force or imminent threat of force;

(2) * * *

(3) * * *

commits criminal deviate conduct * * *"

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 3

In addition to verdicts of guilty, not guilty, and not responsible by reason of insanity, a verdict of guilty but mentally ill at the time of the offense will be submitted to you on all three counts of the information.

Mentally ill, as this term is used in such a verdict, means having a psychiatric disorder which substantially impairs the person's thinking, feeling or behavior and impairs the person's ability to function.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 4

The burden is on the State of Indiana to prove beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant was not mentally ill as that term has been defined.

Therefore, if you find beyond a reasonable doubt that the defendant is guilty of the offense as charged, or of a lesser included offense, you then must determine whether the defendant was mentally ill at the time of the commission of that offense. If you find that the defendant was mentally ill at the time of the offense, or if you have a reasonable doubt as to whether he was mentally ill, and if the defendant has failed to prove his defense of insanity, then your verdict shall be guilty but mentally ill at the time of the offense.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 5

The burden rests upon the State of Indiana to prove beyond a reasonable doubt that the defendant committed each and every element of the crime charged. The defendant is not on trial for any offense other than that charged in the Information, and you may not consider evidence of prior offenses by the defendant in determining his guilt or innocence of the crime charged.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 6

Where there is a reasonable doubt existing in your minds as to the defendant's guilt of an offense, either charged or included in the information, he must be found not guilty.

Where there is a reasonable doubt existing in your minds as to which of two or more degrees of an offense the defendant may be guilty, he must be convicted of the lower degree only.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 7

The term "by a preponderance of the evidence" means that an issue in the case which the party has the burden of proving is more probably true than not true. The defendant has interposed the defense of insanity in this case, and thus the burden is upon the defendant to prove this defense by a preponderance of the evidence.

If you find, from a consideration of all of the evidence, that at the time of the alleged offense it is more probably true than not true that the defendant, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of the conduct, or to conform his conduct to the requirements of law, then your verdict should be "Not responsible by reason of insanity at the time of the offense."

/s/ Michael C. Keating
Attorney for Defendant

Defense of Insanity

DEFENDANT'S INSTRUCTION NO. 8

The term "preponderance of the evidence" means the weight of the evidence. The number of witnesses testifying to a fact on one side or the other or the quantity of evidence introduced on one side or the other is not necessarily of the greater weight. The evidence given upon any fact in issue which convinces you most strongly of its truthfulness is of the greater weight.

/s/ Michael C. Keating
Attorney for Defendant

Defense of Insanity

DEFENDANT'S INSTRUCTION NO. 9

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule appears only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 10

The offenses charged in Counts I, II and III also induce the crime of involuntary manslaughter, which is defined as follows:

"A person who kills another human being while committing or attempting to commit:

(1) A felony that inherently poses a risk of serious bodily injury;

(2) A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) Battery;

commits involuntary manslaughter."

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 11

You are instructed that the offenses charged in Counts I, II and III also include the offense of Voluntary Manslaughter, which is defined as follows:

"(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter.

(b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder 1(1) to voluntary manslaughter."

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 13

You have no right to find the defendant guilty only for the purpose of deterring others from committing crimes of this nature or for the purpose of discouraging the use of the defense of insanity.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 14

The circumstances of suspicion, no matter how grave or strong, are not evidence of guilt, and the accused must be acquitted unless the fact of his guilt is proved beyond every reasonable doubt to the exclusion of every reasonable hypothesis consistent with his innocence.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 15

The defendant, Thomas Schiro, has not taken the witness stand as a witness. His failure to do so shall not, in any manner, be considered by you in arriving at your verdict.

/s/ Michael C. Keating
Attorney for Defendant

DEFENDANT'S INSTRUCTION NO. 17

The term "attempt" is defined as follows:

"A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward the commission of the crime."

/s/ Michael C. Keating
Attorney for Defendant

BROWN CIRCUIT COURT

(caption omitted in printing)

VERDICT FORMS FROM GUILT PHASE

We, the jury, find the defendant is not responsible by reason of insanity at the time of the death of Laura Luebbehusen.

_____ _____
Date Foreperson

We, the Jury, find the defendant guilty of Murder but mentally ill at the time of the death of Laura Luebbehusen.

_____ _____
Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Luebbehusen as charged in Count I of the information.

_____ _____
Date Foreperson

We, the jury, find the defendant not guilty.

_____ _____
Date Foreperson

We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information.

9-12-81 /s/ William J. Yeager
Date Foreperson

We, the Jury, find the defendant guilty while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct as charged in Count III of the information.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Voluntary Manslaughter.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Involuntary Manslaughter.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Voluntary Manslaughter, but mentally ill.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Involuntary Manslaughter, but mentally ill.

_____ _____

Date Foreperson

BROWN CIRCUIT COURT

DOCKET ENTRY OF SEPTEMBER 12, 1981

* * * And now the jury retires in charge of the bailiff of this Court to deliberate upon its verdict. And thereafter, in response to a request by the jury, and by the agreement of the parties, the jury is reread the Court's final instruction number six (6), and the defendant's final instructions numbered two (2) and three (3). And now the jury again retires in charge of the bailiff to deliberate upon its verdict. And, thereafter, the jury returns into open Court its verdict, which is in the following words and figures, to-wit: * * *

VERDICT FORMS FROM PENALTY PHASE

We, the jury, recommend the death sentence be imposed upon the Defendant, Thomas N. Schiro.

Dated: _____ _____

Foreperson

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

We, the jury, recommend that the death penalty not be imposed upon the Defendant, Thomas N. Schiro.

Dated: 9-15-81 /s/ William J. Yeager
Foreperson

/s/ Katherine Botts /s/ Darwin B. Esque

/s/ Phyllis Booher /s/ Patricia Thummel

/s/ Laura Ann Johnson /s/ Mary Jane Richards

/s/ Dennis Lee Blake /s/ Sharon K. Hubor

/s/ Ray Browning Jr. /s/ Kenneth M. Reynolds

/s/ Harold R. Sherrill

We, the jury, have no recommendation.

Dated: _____ _____

Foreperson

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

TRIAL COURT'S ORIGINAL PRONOUNCEMENT OF SENTENCE

THE COURT: Now, this is the pronouncement of sentence. The Defendant having been found guilty by a jury on the twelth of September, 1981, and the Court having entered a judgment of conviction of the crime murder/rape, and on September 15, 1981, the Court having heard argument by Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana, and Michael Keating, for the Defendant, and both the State and counsel for Defendant having moved to incorporate the evidence of the trial, which motion was granted by the Court, and the jury having returned their unanimous recommendation to the Court that the death penalty not be imposed on the Defendant, and the Court having reviewed the evidence of the trial thereafter, and having considered the written Pre-Sentence Report, gives the following reasons for the imposition of the sentence: The jury in its verdict of guilty of Murder/Rape, rejected the plea of insanity. The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community. David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant, submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense. The Defendant's own witness, a psychologist, Dr. Frank Osanka of Napierville, Illinois, who is a behaviorial consultant, in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyeurism, exhibitionism, sexual sadism, necrophelia, sexual telephone harassment and other disorders, all of which are aggravating circumstances, which far outweigh the mitigating circumstances. Among other things, the Defendant's Psychologist, Dr. Frank Osanka, indicated that the Defendant is "overpowered by the need for erotic release". Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist. Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony. At no time has the Defendant indicated any remorse. These are aggravating circumstances. The fact that the Defendant committed these crimes with gruesome, sadistic acts, including necrophilia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught. This is an aggravating circumstance. The Defendant had been previously convicted of robbery, a Class C Felony, in Vanderburgh County and was on

work release when arrested for this crime. This is an aggravating circumstance. This Court personally observed the Defendant, while the jury was present, making continuing rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced the jury in its recommendation. The age of the Defendant is twenty years. This is not a mitigating circumstance, nor was the age of the victim, twenty-eight years, a mitigating circumstance. For all of the above reasons, the Court now sentences the Defendant to death. The sentence is required by the Statutes of the State of Indiana, as all of the aggravating circumstances listed herein by far outweigh any mitigating circumstances. The Court has no choice but to follow the law. The Defendant is to be executed as by law provided on the twenty-eighth day of January, 1982, before sunrise. The Defendant is remanded to the custody of the Sheriff. * * *

IN THE BROWN CIRCUIT COURT

STATE OF INDIANA

v.

THOMAS N. SCHIRO

NUNC PRO TUNC ENTRY
PRONOUNCEMENT OF SENTENCING

The Defendant, Thomas N. Schiro, having been found guilty of Murder while committing and attempting to commit rape, by a jury on the 12th day of September, 1981, which verdict was: "We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information." William J. Yeager, Foreperson; dated September 12, 1981. The Court entered judgment of conviction of the said crime of Murder/Rape.

On September 15, 1981, the jury having been instructed to return, appeared. Present were Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana; the Defendant, Thomas N. Schiro, with his counsel, Michael Keating, and the members of the jury.

A hearing pursuant to Indiana Code 35-50-2-9 was held concerning the recommendation of sentencing. Both the attorney for the State and the attorney for the Defendant moved to incorporate the entire evidence of the trial. Said motion was granted by the Court. Arguments were made by the attorneys, instructions were read to the jury.

The jury, after due deliberation, returned unanimously with the recommendation that the death penalty not be imposed upon the Defendant, Thomas N. Schiro. The matter was set for sentencing on October 2, 1981.

On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, subsection [1] the Aggravating Circumstances alleged.

> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) the mitigating circumstances that may be considered under this section are as follows:

> (1) The defendant has no significant history of prior criminal conduct.
>
> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
>
> (3) The victim was a participant in, or consented to the defendant's conduct.

> (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
>
> (5) The defendant acted under the substantial domination of another person.
>
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
>
> (7) Any other circumstances appropriate for consideration.

The statute provides, as a mitigating circumstance, whether (1) the Defendant has no significant history of prior criminal conduct. The record in this case shows numerous instances of prior criminal conduct by the Defendant.

(a) David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense.

(b) The Defendant's witness, Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist.

(c) Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral

palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony.

(d) The Defendant had been previously convicted of robbery, a Class C Felony, in Vanderburgh County, Indiana, and was on work release when arrested for this crime.

(e) The Defendant's own witness, a psychologist, Dr. Frank Osanka of Napierville, Illinois, who is a behaviorial consultant, in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyeurism, exhibitionism, sexual sadism, necrophelia, sexual telephone harassment and other disorders.

Indiana Code § 35-50-2-9 provides two mitigating circumstances relating to Defendant's mental health:

> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder,
>
> and
>
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(a) The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard A. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury

and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community.

(b) The record indicated that the Defendant has no remorse and is violent and sadistic. The Defendant's Psychologist and own witness, Dr. Frank Osanka, indicates that the Defendant is "overpowered by the need for erotic release".

(c) The fact that the Defendant committed these crimes, as the record shows, with gruesome, sadistic acts, including necrophelia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught, and malice in the crime for which he has been convicted. This shows that he planned the crime and planned how to avoid its consequences, showing Defendant's appreciation for the wrongfulness of his conduct and the consequences of his actions. This shows that Defendant had unimpaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

(d) This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

The Statute also provides as a mitigating circumstance,

> (3) The victim was a participant in, or consented to, the defendant's conduct.

The victim obviously did not consent to being murdered. Defendant was also found guilty beyond a reason-

able doubt, of raping the victim, therefore the victim could not have consented to being raped.

The Statute also provides,

> (4) the Defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

There is no evidence of an accomplice in this record.

The Statute provides,

> (5) The defendant acted under the substantial domination of another person.

There is no evidence on this record that shows that any other person substantially dominated Defendant.

The Statute also requires the consideration of,

> (7) Any other circumstances appropriate for consideration.

The age of the Defendant is twenty years. The Court does not find this to be a mitigating circumstance.

Since the State proved "beyond a reasonable doubt the existence of at least (1) of the aggravating circumstances alleged", (Indiana Code § 35-50-2-9, Section 9(9)) and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff.

/s/ Samuel R. Rosen
SAMUEL R. ROSEN, Judge
Brown Circuit Court

Dated: October 2, 1981

SUPREME COURT OF INDIANA

No. 1181S329

THOMAS N. SCHIRO,
Defendant-Appellant,

v.

STATE OF INDIANA,
Plaintiff-Appellee.

Aug. 5, 1983

PIVARNIK, Justice.

Defendant-appellant, Thomas N. Schiro, was convicted of Murder While Committing or Attempting to Commit Rape, Ind.Code § 35-42-1-1(2) (Burns Repl.1979), at the conclusion of a jury trial in Brown Circuit Court on September 12, 1981. The trial court sentenced Schiro to death. He now appeals.

Schiro raises seven errors on appeal, concerning:

1) whether the Indiana death penalty statute, Ind.Code § 35-50-2-9 (Burns Repl. 1979), is unconstitutional because it fails to provide for adequate review of death sentences;

2) whether the trial court erred in imposing the death penalty;

3) whether a statement given by Schiro was an involuntary custodial statement and should have been excluded from trial;

4) whether the master commissioner of Vanderburgh Circuit Court had authority to issue search warrants;

5) whether the trial court erred in excluding a letter written by the defendant on the issue of his insanity;

6) whether the trial court supplied the jury with all the necessary verdict forms; and,

7) whether the pre-sentence report contained improper information.

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on one nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist confirmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m., on February 5, 1981, the day Laura Luebbehusen's body was found. Schiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay". This story Schiro made up in order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had bet him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro and Luebbe-

husen talked about homosexuality and Luebbehusen told Schiro that she, too, was "gay". Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Luebbehusen try to insert one into his anus. He found the experience too painful and told Luebbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to go buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle, and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

I

Defendant Schiro's first argument concerns the constitutionality of the Indiana Death Penalty statute, Ind.Code § 35-50-2-9 (Burns Repl. 1979). Schiro states specically that the death penalty does not provide for any proportionality review of death sentences by this Court. According to Schiro, the term "proportionality review" requires that the sentence handed down by the trial court be compared to sentences imposed in similar circumstances. This, Schiro urges, would insure that the death penalty is not arbitrarily and capriciously applied. Since Ind.Code § 35-50-2-9 does not explicitly mandate this

form of review and this Court has allegedly failed to engage in such review, Schiro believes that the death penalty statute is unconstitutional.

Schiro admits that two recent cases have upheld the constitutionality of the Indiana death penalty statute. *Williams v. State* (1982) Ind., 430 N.E.2d 759, *appeal dismissed* (1982) —— U.S. ——, 103 S.Ct. 33, 74 L.Ed.2d 47; *Brewer v. State* (1981) Ind., 417 N.E.2d 889, *cert. denied* (1982) —— U.S. ——, 102 S.Ct. 3510, 73 L.Ed.2d 1384. *See also Judy v. State* (1981) Ind., 416 N.E.2d 95. Schiro also notes that the United States Supreme Court, in *Proffitt v. Florida,* (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, found the Florida death penalty statute, which is nearly identical to our death penalty statute, to be constitutional. *Compare* Ind. Code § 35-50-2-9 (Burns Repl.1979) *with Fla.Stat.Ann.* § 921.141 (West Supp.1983). While conceding that the procedure under our statute may be constitutional, Schiro argues that the following passage from *Proffitt* indicates the Supreme Court's mandate of proportionality review in cases involving the death penalty:

> "The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State v. Dixon,* 283 So.2d 1, 10 (1973)."

428 U.S. at 250-51, 96 S.Ct. at 2966, 49 L.Ed.2d at 922.

Although Schiro has not raised this argument, and without going into great detail, we feel it is incumbent to note that this Court has consistently held that the death penalty does not violate the ban against cruel and unusual punishment, Article 1, § 16 of the Indiana Constitution. *Brewer, supra,* 417 N.E.2d at 894; *Adams v. State,* (1971) 259 Ind. 64, 74, 271 N.E.2d 425, 430, and cases cited therein. Similarly, the United States Supreme Court has held that the death penalty does not violate the Eighth Amendment of the United States Constitution. *Gregg v. Georgia,* (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida,* (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas,* (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929.

This Court has comparatively analyzed the Florida death penalty statute, approved in *Proffitt, supra,* and our own statute at great length. *Brewer, supra,* 417 N.E.2d at 897; *see also Judy v. State,* 416 N.E.2d at 107. Both statutes require the following prerequisites before a sentence of death may be imposed and executed:

"(1) A conviction of murder.

(2) A hearing for purposes of determining the sentence to be imposed, separate from the trial at which the issue of guilt was determined.

(3) In jury trials, a finding, by the jury, of at least one (1) of the aggravating circumstances enumerated in the statute.

(4) In jury trials, a finding, by the jury, that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(5) In jury trials, a recommendation by the jury, as to whether or not the death penalty should be imposed.

(6) A finding by the trial court of at least one (1) of the aggravating circumstances enumerated in the statute.

(7) A finding by the trial court that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(8) The completion, prior to carrying out the sentence, of an automatic expedited review of the imposed sentence by the Supreme Court of the State."

Brewer, 417 N.E.2d at 897.

We also felt in *Brewer* that Indiana is more restrictive than Florida in applying the death penalty. Indiana law requires that the sentencing hearing be before the same jury that tried the guilt issue, whereas Florida may, under certain circumstances, impanel a special jury for the hearing. *Id.* at 898. The standard of proof for a finding of at least one of the aggravating circumstances is beyond a reasonable doubt in Indiana, while Florida does not require a specified standard of proof. *Id.*

Still, regardless of the above distinctions, defendant Schiro would argue that under *Proffitt,* Indiana does not engage in a meaningful appellate review of death sentences. We disagree.

We interpreted the United States Supreme Court's holding in *Gregg v. Georgia, supra,* a companion case to *Proffitt,* to be that the death penalty may be applied ". . . if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously." *Brewer, supra,* 417 N.E.2d at 897.

It is clear that the imposition of the death sentence under Ind.Code § 35-50-2-9 is based upon the nature and circumstances of the crime and the character of the offender being sentenced. *Judy, supra,* 416 N.E.2d at 105. Also, this Court has adopted a rule wherein it has exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment, or a minimum sentence of greater than ten years. Ind.R.App.P.

4(A)(7). Therefore, because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment, we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana.

In addition, rules adopted by this Court govern the appellate review of sentences:

> "Rule I
>
> AVAILABILITY—COURT
>
> (1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.
>
> (2) Appellate review of sentences under this rule may not be initiated by the State.
>
> (3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.
>
> Rule 2
>
> SCOPE OF REVIEW
>
> (1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
>
> (2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Ind.R.App.Rev.Sen. 1 and 2.

In all cases involving the finding of aggravating circumstances, the sentencing judge must include a statement of the reasons for selecting the sentence he imposes.

This enactment, Ind.Code § 35-4.1-4-3 (§ 35-50-1A-3) (Burns Repl.1979), reads as follows:

> "SENTENCING HEARING IN FELONY CASES.—Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:
>
> (1) A transcript of the hearing;
>
> (2) A copy of the presentence report; and
>
> (3) If the court finds aggravating circumcumstances or mitigating circumstances a statement of the court's reasons for selecting the sentence that it imposes."

The above statute insures that in all instances where the death penalty is applied, the trial court judge must submit written findings indicating the aggravating factors he found to be present in imposing a sentence of death. This will guard against the influence of improper factors at the trial level and will make sure that the evils of *Furman v. Georgia*, (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, "arbitrary and capricious application" of the death penalty, were not present in the sentencing decision.

Not only do the trial judge's written findings facilitate meaningful appellate review, this review is guaranteed to be thorough and adequate since we have before us the entire record of the proceedings, not just the sentencing hearing. *Brewer, supra*; *Judy, supra*. Thus, examination of the record, plus the sentencing hearing and the trial court's findings, protects each individual's constitutional rights.

Therefore, because of procedure mandated by statute, codified by rules, and controlled by cited precedent,

". . . this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures 'consistency, fairness, and, rationality in the evenhanded operation' of the death penalty statute. *Proffitt v. Florida, supra,* 428 U.S. at 259-60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927. *See Gregg v. Georgia,* (1976) 428 U.S. 153, 194-95, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886-87. *Cf. Woodson v. North Carolina,* [428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944], *supra*; *French v. State,* [266 Ind. 276, 362 N.E.2d 834], *supra.* The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case. Therefore, we find our death sentencing procedures to be consistent and in full compliance with those required by the United States Supreme Court in *Gregg v. Georgia* and *Proffitt v. Florida,* and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution."

Judy, supra, 416 N.E.2d at 108.

We find no constitutional infirmities in the death penalty statute nor in the review that automatically follows the imposition of such sentence.

II

The next issue concerns the trial court's imposition of the death penalty. Defendant Schiro's argument may be divided into four sub-categories:

A. Whether Ind.Code § 35-50-2-9 permits a trial court to override a jury's recommendation that the death penalty not be imposed;

B. Whether the procedure established by Ind.Code § 35-50-2-9 places a defendant in double jeopardy;

C. Whether the imposition of the death penalty failed to conform to Ind.Code § 35-50-2-9; and,

D. Whether this Court, after reviewing the case at hand, should vacate the sentence of death.

A.

Schiro's first dispute is with the following language found in Ind.Code § 35-50-2-9:

> "(e) If the [death penalty] hearing is by the jury, the jury shall recommend to the court whether the death penalty should be imposed.
>
> * * * *
>
> (2) . . .
>
> The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

Schiro argues that the use of the word "whether" indicates that the sole purpose of the jury at the death penalty hearing is to render a recommendation of death only if it is justified under the facts. The legislative intent would make a jury recommendation of *no* death penalty binding upon the trial court. If the jury did recommend a sentence of death, the legislature also intended that the trial court could behave as a safety valve by overriding such a recommendation and imposing a sentence of years. Thus, Schiro argues, while a trial court may override a

recommendation of death, it may not impose the death penalty if the jury holds otherwise.

We wrote in *Foremost Life Ins. Co. v. Dept. of Ins.*, (1980) Ind., 409 N.E.2d 1092, 1095-96:

> "In interpreting a statute we are to ascertain and give effect to the intent of the legislature. *State ex rel. Baker v. Grange*, (1929) 200 Ind. 506, 510, 165 N.E. 239, 240; *Ervin v. Review Bd.*, (1977) Ind.App. [173 Ind.App. 592], 364 N.E.2d 1189, 1192; *Abrams v. Legbrandt*, (1974) 160 Ind.App. 379, 388, 312 N.E.2d 113, 118; *Marhoefer Packing Co. v. Indiana Dept. of State Revenue*, (1973) 157 Ind.App. 505, 516, 301 N.E.2d 209, 214.
>
> In determining the legislative intent, the language of the statute itself must be examined, including the grammatical structure of the clause or sentence in issue. . . . Further, a statute is to be examined and interpreted as a whole, giving common and ordinary meaning to words used in English language and not overemphasizing a strict literal or selective reading of individual words. *Combs v. Cook*, (1958), 238 Ind. 392, 397, 151 N.E.2d 144, 147; *Abrams v. Legbrandt, supra*."

The American Heritage Dictionary (1971 ed.) in its definition of "whether" says the word is "[u]sed in indirect questions to introduce one alternative: *We should find out whether the museum is open.*" Using the accepted definition of "whether", we find that under Ind.Code § 35-50-2-9, the jury is mandated to make a choice between the death penalty or no death penalty. Therefore, Schiro's argument, that the statute only allows the jury to recommend the death penalty, fails, and because of this, his assertion that the trial court may only reject death penalty recommendations also fails. We should also note that Schiro's premise (a recommendation against the death penalty is binding upon the trial court) thwarts legislative

intent. Ind.Code § 35-50-1-1 (Burns Repl.1979) abolished the jury's role in determining or setting a sentence. *Debose v. State*, (1979) 270 Ind. 675, 676, 389 N.E.2d 272, 273. If we accept Schiro's argument, the trial court would be severely limited in imposing sentence under Ind. Code § 35-50-2-9 whenever a jury voted against the death penalty. Under the defendant's reasoning, the trial court would have no choice but to impose a term of years. Such action goes against the legislative intent of removing the jury's role in sentencing defendants. The jury plays an advisory role under Ind.Code § 35-50-2-9(e) and the trial court may properly override a jury's recommendation.

B

Schiro next argues that he was placed in double jeopardy because the trial court ignored the jury's recommendation and sentenced him to death. Having been given the chance to seek the death penalty before the jury, the State, Schiro urges, should not be given a second chance to litigate the same issues before the trial court. Schiro cites *Bullington v. Missouri*, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 in support of his position.

The Double Jeopardy Clause of the Fifth Amendment provides,

> ". . . that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' The Double Jeopardy Clause was made applicable to the states through the Fourteenth Amendment in *Benton v. Maryland*, (1969) 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. The Clause has been held to embody three separate but related prohibitions: (1) a rule which bars a reprosecution for the same offense after acquittal; (2) a rule barring reprosecution for the same offense after conviction, and; (3) a rule barring multiple punishment for the same of-

fense. *North Carolina v. Pearce*, (1969) 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656."

Elmore v. State, (1978) 269 Ind. 532, 533-34, 382 N.E.2d 893, 894.

Defendant Schiro's reliance on *Bullington, supra*, is misleading. Missouri law explicitly requires the jury, not the trial court, to impose the death penalty in cases tried before a jury. Mo.Ann.Stat. § 565.006 (Vernon 1979). This involves a bifurcated proceeding where, after the defendant is convicted, the prosecution offers evidence in support of the death penalty. This hearing must be held before the same jury that convicted the defendant of murder. The jury must find at least one aggravating circumstance beyond a reasonable doubt and put its findings in writing. A jury's decision to impose the death penalty must be unanimous; if it cannot reach a decision, the alternative sentence of life imprisonment is imposed.

In *Bullington*, the defendant was convicted of murder but the jury fixed his punishment at life imprisonment. While the defendant's motion for a new trial or judgment of acquittal was pending, the United States Supreme Court decided *Duren v. Missouri*, (1979) 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579. That case held that the Missouri law allowing women to be exempted from jury duty deprived a defendant of his right under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross-section of the community. The trial court, relying on *Duren*, granted a new trial for defendant Bullington.

Defendant was again convicted of murder and the State sought the death penalty. The United States Supreme Court held that the second seeking of the death penalty, under the Missouri statute, violated the proscription against double jeopardy. The bifurcated proceeding requires the jury to determine whether the prosecution has proved its case. Analogizing the first jury's decision to impose life imprisonment to that of an acquittal (i.e., the

jury could not find an aggravating circumstance beyond a reasonable doubt sufficient to impose a death sentence), and holding, of course, that an acquittal is absolutely final, the Supreme Court wrote that the prosecution is not entitled to another chance at the death penalty. 451 U.S. at 446, 101 S.Ct. at 1861-62, 68 L.Ed.2d at 283.

As the facts illustrate, *Bullington* was a unique decision that is clearly distinguishable from the situation presented here. Prior decisions held that the Double Jeopardy Clause did not prohibit the imposition of a harsher sentence on retrial, *North Carolina v. Pearce, supra*, but Bullington found an exception to that rule. The Supreme Court ruled that the Missouri sentencing hearing had the hallmarks of a trial on guilt or innocence. All issues are decided, reduced to written findings, and made binding since the jury's decision is the final determination of the sentence. In Indiana, the jury does not make a final determination of the sentence. It only releases an opinion of its recommendation, not an ultimate determination.

Schiro also argues that the jury's recommendation shows that the State failed to prove an aggravating circumstance beyond a reasonable doubt. This is not necessarily so. The statute does not require the jury to list its reasons for the recommendation. It could well be that a jury found the aggravating circumstance to be present, but felt it was outweighed by mitigating circumstances. The judge's determination is based on the same standards as the jury's recommendation and he determines whether the aggravating circumstances has been proved beyond a reasonable doubt. His findings are put in writing so that we may adequately review them on appeal. The judge's determination was the completion of a single trial process of which the jury recommendation was only an intermediate stage. We find no error in the procedure used by the trial court in rejecting the jury's recommendation.

C

The original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty. We ordered the trial court to make written findings in this case, setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind.Code § 35-50-2-9. At the same time we afforded defendant Schiro the opportunity to file a brief contesting the *nunc pro tunc* entry of the trial court. The State was given the opportunity to oppose the defendant's brief. In the brief, Schiro argues that the *nunc pro tunc* entry is inappropriate; that he has been twice placed in jeopardy; and that the *nunc pro tunc* entry does not comply with Ind.Code § 35-50-2-9.

The State counters Schiro's first argument by contending that the *nunc pro tunc* entry simply restates the trial court's findings so that they conform with the requirements of Ind.Code § 35-50-2-9. A *nunc pro tunc* entry is

> "'an entry made now of something which was actually previously done, to have effect as of the former date.' *Perkins v. Hayward*, (1892) 132 Ind. 95, 31 N.E. 670. Such entries may provide a record of an act or event of which no reference at all is made in the court's order book, as was the case in *Neuenschwander v. State*, (1928) 200 Ind. 64, 161 N.E. 369, and *Warner v. State*, (1924) 194 Ind. 426, 143 N.E. 288, or they may serve to change or supplement an entry already existing in the order book as was the case in *Apple v. Greenfield Banking Co.*, (1971) 255 Ind. 602, 266 N.E.2d 13, and *Perkins v. Hayward*, *supra*. Such entries must be based upon written memoranda, notes, or other memorials which (1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings

> made by the court; and (4) must exist in the records of the court contemporaneous with or preceding the date of the action described. *Blum's Lumber & Crating, Inc. v. James et al.*, and *State ex rel. Baertich v. Perry County Council et al.*, (1972) 259 Ind. 220, 285 N.E.2d 822; *O'Malia v. State*, (1934) 207 Ind. 308, 192 N.E. 435; *Schoonover v. Reed*, (1879) 65 Ind. 313; *Pittsburgh etc. R. Co. v. Lamm*, (1916) 61 Ind.App. 389, 112 N.E. 45."

Stowers v. State, (1977) 266 Ind. 403, 410-11, 363 N.E.2d 978, 983. There has been precedent for *nunc pro tunc* entries in death penalty cases. In *Judy v. State*, *supra*, the record of the proceedings did not contain the written findings required in death penalty cases. The case was remanded and the trial court was instructed to enter written findings made *nunc pro tunc* effective the date of the sentencing hearing. Such actions are also common in cases involving enhanced sentences where the trial court does not comply fully with the mandate of *Gardner v. State*, (1979) 270 Ind. 627, 388 N.E.2d 513. *See e.g., Alleyn v. State*, (1981) Ind., 427 N.E.2d 1095. We request this specificity upon review so that

> "we [may] fulfill our responsibility to review the trial court's exercise of its judicial discretion. The trial court's statement is important also because it further serves to enlighten the defendant and the community as to the trial court's reasons for the imposition of an enhanced sentence, thereby greatly bolstering the public's confidence in the fairness and justice of our State's judicial process."

Spinks v. State, (1982) Ind., 437 N.E.2d 963, 968.

In a recent case, *Eddings v. Oklahoma*, (1982) 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, the United States Supreme Court remanded a death penalty case to the Oklahoma Court of Criminal Appeals. The trial court

had refused to consider, as a matter of law, the defendant's character and record of family history as a possible mitigating factor. The Supreme Court ruled that this was error and vacated the death sentence but at the same time remanded the case to the Oklahoma courts. It was made very clear that the Supreme Court would not weigh this evidence of family background; that was the role for the Oklahoma courts. Thus, the death penalty could be reinstated on remand if the Oklahoma courts found that the defendant's background was not sufficient to outweigh imposition of the death sentence.

We also found it proper to remand this cause and order the trial court to comply fully with the death penalty statute. We did not demand a new decision; instead, we simply requested that the trial court provide its reasons for the harsher sentencing and these particular findings must be in the proper form. Only when we adequately review the imposition of the death sentence. Ind.Code § 35-50-2-9 lists only nine aggravating circumstances which may be used in seeking the death penalty. In this case, it appears that the trial court listed wrongly as aggravating circumstances its counter-arguments to any possible mitigating circumstances available to the defendant. Thus, to ensure fairness to both sides, and to make certain that proper considerations were utilized by the trial court in imposing sentence, we felt that remanding the case so that the written findings conform with the death penalty statute was the proper remedy.

In support of his double jeopardy argument, defendant Schiro again cites *Bullington, supra,* Issue IIB. Without going into great detail, we determined above that *Bullington* is not controlling on this matter. Here a judgment of death had been entered. All we requested was that the trial court put its findings in the proper form. No new determination of sentence was made, no new evidence was presented, and no reweighing of the facts took place. We fail to see how double jeopardy attached by

remanding this cause for compliance with Ind.Code § 35-50-2-9.

Finally, Schiro argues that the *nunc pro tunc* does not comply with Ind.Code § 35-50-2-9 for two reasons: first, the trial court did not take the jury's recommendation into consideration; and, second, that the trial court did not exercise any discretion but instead felt that the death sentence had to be mandatorily imposed.

Ind.Code § 35-50-2-9(e) reads that the "[trial] court shall make the final determination of the sentence, after considering the jury's recommendation. . . ." Schiro insists that the trial court failed to do this. An examination of the *nunc pro tunc* entry, however, reveals just the opposite. The trial court specifically stated that the jury had unanimously recommended that the death penalty not be imposed. Thus, the trial court was aware and cognizant of the jury's recommendation. Later, the trial court stated that the defendant continually "rocked" only in the jury's presence, and that this "fact may well have influenced and misled the jury in its recommendation." It is evident that the trial court did consider the jury's recommendation.

Schiro also takes issue with a passage in the *nunc pro tunc* entry. After carefully weighing all the mitigating circumstances, the trial court stated that "the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law." Schiro argues that this makes for a mandatory imposition of the death penalty.

The imposition of a mandatory death penalty is contrary to constitutional considerations. *Woodson v. North Carolina,* (1976) 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *French v. State,* (1977) 266 Ind. 276, 362 N.E.2d 834. The entire *nunc pro tunc* entry illustrates that the trial court felt that the requirements of the law, which calls for the death penalty only after strict consideration of all possible mitigating circumstances, had

been satisfied. Perusal of the record shows that after careful consideration, the death penalty was deserved and justified. The language of the trial court may appear awkward but nowhere has the trial court or this Court attempted to apply anything resembling a mandatory death penalty. The *nunc pro tunc* entry complies with Ind.Code § 35-50-2-9.

D

In this last sub-paragraph of Issue II, Schiro urges this Court to overturn the death penalty. The main basis for this contention is that the trial court rejected the jury's recommendation that no death penalty be imposed. Schiro believes this Court should impose a stricter standard of review in situations where the trial court and jury disagree about the imposition of a sentence of death.

It is true that in *Gregg v. Georgia, supra,* the United States Supreme Court spoke of the important society function fulfilled by jury sentencing. 428 U.S. at 181-82, 96 S.Ct. at 2929, 49 L.Ed.2d at 879. But on the same day, in a companion case, *Proffitt v. Florida, supra,* the Supreme Court pointed out that it

> "has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

428 U.S. at 252, 96 S.Ct. at 2966, 49 L.Ed.2d at 923.

In Issue I, we discussed the great care and scrutiny that goes into the review of all death penalty cases. While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial

court and jury disagree about the imposition of the death penalty. Trial courts are presumed to know and understand the law. We have as great a confidence in the trial court's function in our judicial system as we do in the function of the jury. It may be that a jury which is to be involved in a capital case only once would be reluctant to impose this most severe form of punishment. This is not to say that all juries would be reluctant to do so, nor that trial courts are more callous and more inclined to impose a sentence of death. Rather, the trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity. This should result in greater consistency in sentencing. Furthermore, this Court, using the existing standards for appellate review of sentences, will ensure that the death penalty is not imposed where it is unreasonable to do so. We will not engage in a different standard of review where jury and trial court disagree.

After disposing of the defendant's four separate subcategories, we now turn to examine whether the sentence of death is appropriate. The transcript of the sentencing hearing and the trial court's written findings show that the court found that Schiro intentionally killed Laura Luebbehusen while committing or attempting to commit rape. After examining the record, we agree with the trial court's findings. Mary Lee and Dr. Frank Osanka recounted the events as told to them by Schiro. Schiro saw the victim a couple of times prior to the day of the murder. He made up his mind that he would rape her and perform his "ritual." After work, Schiro pretended that his car broke down and thus gained access to Luebbehusen's apartment by requesting assistance. Once inside, Schiro persuaded her that he was homosexual but they eventually had intercourse. Dr. Osanka said he was not certain but he was almost positive that the victim was coerced into such activity. Schiro then attempted to get

the victim in a comatose or drowsy state by having her consume alcohol and pills. One of his fantasies was to work in a funeral parlor and make love to the bodies of dead women. Sometime during this process Schiro fell asleep but awakened when the victim tried to escape. He grabbed her, pulled her back in, and raped her. Later they left to purchase some alcohol and then returned, at which time Schiro raped the victim again.

Schiro fell asleep on the couch but awoke when the victim again tried to escape. This time Luebbehusen was fully dressed. Schiro forced her to lie down on the bed beside him. He believed that she fell asleep or passed out. At that point he decided to kill her. Grabbing a vodka bottle, he smacked it against her head and it broke. Luebbehusen started to protest but Schiro grabbed an iron and continued to beat her. Finally, he grabbed the victim around the neck and strangled her. Schiro then began his "ritual." He dragged the corpse into another room, undressed it, and sexually and sadistically assaulted it.

As for the mitigating factors, the trial court did not find any. The court found that the defendant had been engaged in numerous instances of prior criminal conduct. Psychiatrists testified to Schiro's numerous rapes and other criminal deviate conduct. Mary Lee testified about Schiro's sadistic assaults on her child. Another witness testified that Schiro raped her in the presence of her child. Although the defendant related instances of sexual perversion, sadism, necrophilia, exhibitionism, and voyeurism, both of the court-appointed psychiatrists felt that Schiro was in good contact with reality. Both men testified that Schiro was not insane, showed no remorse, was violent and sadistic, and both thought him to be a danger to the community.

The trial court said the defendant attempted to conceal his crime, thereby showing his appreciation for the wrongfulness of his conduct. The court also thought Schiro

tried to delude the jurors into thinking he was mentally unstable by rocking back and forth only in their presence. The trial court failed to find that Schiro's age, twenty years, was a mitigating factor.

We find that with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen. Although the record shows that Schiro engaged in bizarre sexual perversions at an early age and for some length of time, we also find that the evidence, as attested to by psychiatrists, indicated he could have conformed his conduct to the law. Such pitiful behavior should not serve as an excuse for the atrocious acts in this matter. The facts in the record, which show the horrifying nature of this rape/murder and the character of this offender, and the compliance of the trial court with the procedures of Ind. Code § 35-50-2-9, lead us to conclude that the death penalty was not arbitrarily or capriciously applied, and is reasonable and appropriate. The trial court is affirmed in the imposition of the death penalty.

III

Schiro argues on appeal that the statement he gave to Ken Hood, in which he admitted killing Laura Lubbehusen, should have been suppressed at trial. He claims that his confession was the result of a custodial interrogation and Ken Hood failed to give *Miranda* warnings prior to Schiro's statement. Schiro also argues that the illegal statement taints all evidence seized as a result of his confession. Such evidence would include Mary Lee's testimony because the police were directed to her through the statement, and objects taken from Schiro's room. Schiro feels that this evidence should have been excluded from the trial.

Miranda warnings, *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, do not have to be given in all interrogations. In *Johnson v. State*, (1978) 269 Ind. 370, 375-76, 380 N.E.2d 1236, 1240, this Court wrote:

> "It is settled that the procedural safeguards of *Miranda* only apply to what the United States Supreme Court has termed 'custodial interrogation.' *Oregon v. Mathiason* (1977) 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714; *Bugg v. State*, (1978) Ind., [267 Ind. 614] 372 N.E.2d 1156, 1158. Custodial interrogation refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Mathiason, supra*, 429 U.S. at 494, 97 S.Ct. at 711, 50 L.Ed.2d at 719. The concept of custodial interrogation does not operate to extend the *Miranda* safeguards to spontaneous voluntary statements, i.e. statements which are either not made in response to questions posed by law enforcement officers while the defendant is in custody, *Bugg v. State, supra*, or statements which are made before the officers are given an opportunity to administer the *Miranda* warnings. *New v. State* (1970) 254 Ind. 307, 259 N.E.2d 696."

Schiro argues that Ken Hood was a law enforcement officer who interrogated him in Hood's office. The State strongly argues that Hood, as director of the Second Chance Halfway House, was not a law enforcement officer and no interrogation took place. Both parties have cited other jurisdictions in support of their view on Hood's law enforcement status. We do not find it necessary to determine whether Hood was a law enforcement officer, although Hood stated that he had no ties to any law enforcement agency, was not a sworn peace officer, and was not responsible for the investigation of any criminal activity. From the facts presented in this case, our first point of inquiry is to determine whether a "custodial interrogation" took place. Cases from both the United States Supreme Court and this Court have stated that *Miranda, supra*, does not apply outside the inherently coercive custodial interrogation for which it is designed. *Roberts v. United States*, (1980) 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622, 631; *Smith v. State*, (1981) Ind., 419 N.E.2d 743, 747. We examine all the facts to determine whether custodial interrogation took place.

A perusal of the record covering the suppression hearing and Hood's testimony at trial reveals the following: On the day in question, Schiro approached his work release counselor, a Mr. Williamson, and said that he had something "heavy" to discuss. Williamson was busy checking the sign-in, sign-out sheets to see whether any of the residents were out of the building during the time Laura Lubbehusen was murdered. Williamson was doing this under Hood's direction. Hood stated that while he did not think any of the residents were involved in the murder, he was afraid adverse publicity might arise because the victim's car was found near the Second Chance Halfway House. Therefore, he wanted to counter any possible bad publicity by showing that all the residents were in the facility when the crime occurred. Williamson thought Schiro's problem concerned his alcoholism and said that if it was serious, Schiro should go see Hood. Williamson called Hood and told him Schiro was on his way to discuss a problem.

Hood stated that he and the staff are strictly concerned in treating the individual resident's problems. In fact, Schiro had been in his office earlier that day and they discussed transferring him to another facility where Schiro could receive better treatment for his drinking problem. When Schiro arrived, Hood said he seemed nervous and upset but did not appear to be under the influence of

alcohol or drugs. After ascertaining that Schiro's alcoholism was not the reason for his converation, Hood started asking Schiro general questions. Hood felt that Schiro wanted to talk but appeared uncertain as to what he wanted to discuss. Hood thought that some general questions might calm him down. Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station.

We do not find that these facts show a custodial interrogation took place. Schiro voluntarily wanted to talk to someone about this crime. He was not the object of suspicion by Hood or anyone else, and Hood was only talking to Schiro upon Schiro's request. Schiro argues that under the rules of the facility, he could not leave unless he signed out on authorized business. Thus, he feels that he was in custody anywhere in the building. Hood stated that the residents could move about the facility at their leisure, stroll the grounds, and one door was always left unlocked. Regardless, Hood also said that he was not keeping Schiro in his office and he was free to leave at any time. Schiro was never placed in physical custody or restrained in any way. Schiro approached Hood, not vice versa. We fail to see that Schiro was coerced, either blatantly or inherently, into making a confession. There was no need for Miranda warnings from Hood.

Due to the disposition of the above issue, we also hold that Schiro's confession does not taint all evidence seized as a result of his statement. Therefore, Mary Lee's testimony and evidence taken from Schiro's room were properly admitted at trial.

IV

Defendant Schiro argues that the search warrant issued by Maurice O'Connor, acting as Master Commissioner of the Vanderburgh Circuit Court, is invalid due to this Court's decision in *State ex rel Smith v. Starke Circuit Court*, (1981) Ind., 417 N.E.2d 1115. Due to the alleged defective nature of the search warrant, which was State's Exhibit 45, Schiro argues that all evidence seized because of the search warrant, such as his blood-stained coat, should not have been introduced at trial.

Defendant Schiro is in error on this issue. *State ex rel. Smith v. Starke Circuit Court* dealt with statutes providing for appointment of commissioners by circuit courts of Starke, Vanderburgh, and St. Joseph counties. The opinion was handed down on March 23, 1981, and we held that the holding shall have only prospective application and shall apply to or affect only those cases which had not yet reached final judgment or had not yet had a ruling on the motion to correct errors. *Id.*, 417 N.E.2d at 1124. The search warrant in this cause was issued in February, 1981, and the trial began in September, 1981; therefore, Schiro is correct in stating that his pending trial fell within the ambit of the opinion's prospective application. However, we declared only the following sections to be unconstitutional: Ind.Code § 33-4-1-74.4(b); 33-4-1-82.2 (b); and 33-4-1-75.1(c) (Burns Supp.1980). Those sections gave the master commissioner power to exercise full jurisdiction over any probate matters, civil matters, or criminal matters, but we did not hold the power to issue search warrants to be unconstitutional. The statute for Vanderburgh county states in pertinent part that the

"master commissioner may conduct preliminary hearings in criminal matters and issue search warrants and arrest warrants and fix bond thereon, and he may enforce court rules." Ind.Code § 33-4-1-82.2(a) (Burns Supp.1982). The search warrant was properly issued and evidence seized was properly introduced at trial.

V

Dr. Walter Abendroth was called by the State to testify about defendant Schiro's mental state. Dr. Abendroth had been treating Schiro prior to the murder. Most of this treatment dealt with Schiro's problem with alcohol and drugs. On cross-examination, the defense attempted to introduce a letter, allegedly written by Schiro, which Mary Lee delivered to Dr. Abendroth. The State objected on lack of foundation of Abendroth's ability to authenticate the letter as one written by Schiro. The trial court sustained the objection. Defendant Schiro argues that the objection should have been overruled because the exhibit was relevant, material, and competent evidence, and was not in violation of any rules of evidence.

In the appellate brief, Schiro also argues that the letter should have been admitted because a plea of insanity "opens wide the door to all evidence relating to the defendant and his environment." *Wilson v. State,* (1966) 247 Ind. 454, 461, 217 N.E.2d 147, 151. This is true but exhibits must be sufficiently identified to be admissible in evidence. *D.H. v. J.H.,* (1981) Ind.App., 418 N.E.2d 286; *Leslie v. Ebner,* (1918) 67 Ind.App. 32, 118 N.E. 829. A letter alleged to have been received from a particular source is not admissible until its authenticity, identity, and genuineness have been sufficiently shown. 13 I.L.E. *Evidence* § 163 (1959); 29 Am.Jur.2d *Evidence* § 879 (1967).

Dr. Abendroth said he could recognize Schiro's handwriting, probably because he received three or four prior letters from Schiro, but never explained how he knew the

letters were actually written by Schiro. Defense counsel never asked Abendroth if he saw Schiro write the letters or if Schiro personally delivered them and said they were written by him. This lack of authentication was the basis for the trial court sustaining the objection to the letter's introduction. Mary Lee, not Schiro, delivered the letter to Dr. Abendroth. Due to this fact, defense counsel could have had Mary Lee authenticate the letter when she testified later in the trial, but defense counsel failed to do this. We find that in addition to the lack of authenticity, any alleged error on this issue has been waived because defense counsel failed to resubmit the evidence when Mary Lee took the stand.

VI

When the jurors were ready to begin their deliberations, the trial court gave them the following verdict forms:

1) Guilty of Murder as charged in Count I
2) Guilty of Murder Rape as charged in Count II
3) Guilty of Murder Deviate Conduct as charged in Count III
4) Guilty of Voluntary Manslaughter
5) Guilty of Involuntary Manslaughter
6) Not guilty.
7) Not responsible by reason of insanity
8) Guilty of Murder but mentally ill
9) Guilty of Voluntary Manslaughter but mentally ill
10) Guilty of Involuntary Manslaughter but mentally ill.

The Guilty of Murder Rape verdict was returned on September 12, 1981. The jury was allowed to go home

and was instructed to return on September 15 for the penalty phase of the trial. Before the jury returned on the 15th, defense counsel made a motion to reject the verdict because two verdict forms were not submitted to the jury. After some discussion this motion was denied and the penalty phase of the trial began. On appeal, defendant Schiro argues that it was reversible error to omit the following forms: Guilty of Murder while committing and attempting to commit rape, but mentally ill; and Guilty of Murder while committing and attempting to commit Criminal Deviate Conduct but mentally ill.

In *Himes v. State*, (1980) Ind., 403 N.E.2d 1377, 1382, this Court wrote:

> "We have previously held that when the jury was permitted to retire without sufficient forms of verdict, the number of forms submitted cannot be considered as reversible error where the record does not show that the accused tendered or requested any other forms. *Bowman v. State*, (1934) 207 Ind. 358, 192 N.E. 755; *Kirkland v. State*, (1956) 235 Ind. 450, 134 N.E.2d 223."

An examination of the hearing on the September 15th motion reveals that the trial court originally raised the question of insufficient verdict forms. At that time defense counsel did not request that any additional verdict forms be submitted but apparently changed his mind a few days later. Thus, we find no reversible error because defendant failed to request any other verdict forms when the situation was first brought to his attention. *Himes, supra.*

The trial court also mentioned that Defendant's Instruction 3 informed the jury that the verdict of guilty but mentally ill was submitted to them on all counts of the information. Thus, the jury was informed that the mentally ill verdict applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of

Murder. Defendant has failed to show any prejudice on this issue. *Johnson v. State*, (1982) Ind., 432 N.E.2d 403, 405. There is no reversible error on this issue.

VII

Finally, defense counsel moved to strike a portion of the presentence report which listed certain factors as "aggravating." Defendant Schiro feels that this conclusory language invades the province of the trial court in determining the existence of aggravating and mitigating circumstances under Ind.Code § 35-50-2-9. The presentence report recommended that Schiro receive a severe penalty. Defendant moved to have the recommendation section removed from the report, but was overruled by the trial court, althought it did delete one sentence which characterized various factors as aggravating circumstances.

Ind.Code §§ 35-4.1-4-9, -10 (35-50-1A-9, -10) (Burns Repl.1979) provide for the making of a pre-sentence report in order to assist the judge in sentencing. Some factors the probation officer may take into account include "the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education and personal habits." Ind.Code § 35-4.1-4-10 (35-50-1A-10). Furthermore, this Court wrote in *Lottie v. State*, (1980) Ind., 406 N.E.2d 632, 640:

> "[T]he Court of Appeals held [in *Halligan v. State*, (1978) 176 Ind.App. 472, 375 N.E.2d 1151] that the pre-sentence investigation and report may include any matter which the probation officer deems relevant to the question of sentence. These matters obviously could be in favor of or against the defendant and are presented in the report as a finding or an opinion of the probation officer. The defendant is, of course, given the opportunity to rebut any and all of these matters. . . . The United States Supreme

> Court has stated that it is essential for a sentencing judge to be as well informed as possible concerning the defendant's life and characteristics in order to select an appropriate sentence. The Court further stated that '. . . modern concepts individualizing punishment have made it all the more necessary to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.' *Williams v. New York,* (1949) 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed 1337,1343."

Schiro was given the opportunity to refute the allegations made in the report. It appears that Schiro had a "personality conflict" with the probation officer because she was a woman and he also contested portions of the report wherein he admitted making false statements in order to receive leniency for earlier crimes. The sentencing judge listened patiently to everything Schiro had to say and then gave his decision. Trial court judges are presumed to know and understand the laws of this state. The mere fact that the probation officer labeled certain factors as "aggravating" does not imply that the judge would automatically assume that this is so. As the record shows, the trial judge did scratch the last reference to "aggravating factors." Defendant Schiro has not shown that any portion of the pre-sentence report was illegal or that it should not have been presented to the trial judge.

We affirm the trial court in all matters and in the imposition of the death penalty. This cause is remanded to the trial court for the purpose of setting a date for the death sentence to be carried out.

GIVAN, C.J., and HUNTER, J., concur.

DeBRULER, J., concurring and dissenting with separate opinion.

PRENTICE, J., concurring and dissenting with separate opinion.

DeBRULER, Justice, concurring and dissenting.

Following the jury sentencing hearing, the jury, after deliberating for one hour, returned a unanimous recommendation that the death penalty not be imposed. Two weeks later at the judge sentencing hearing, the judge overrode that recommendation and sentenced appellant to die. The conviction should be affirmed, but several independent legal grounds exist which require the penalty of death to be vacated.

I.

Upon considerations going to the meaning and spirit of the Double Jeopardy Clause of the Fifth Amendment and the like provision of the Indiana Constitution, Art, § 14, a sentencing judge cannot be permitted to override a jury recommendation of no death penalty arrived at pursuant to the death sentence statute. Ind.Code § 35-50-2-9. A jury verdict of not guilty on the issue of guilt or innocence is absolutely beyond the authority of judges to override. *Fong Foo v. United States,* (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629. This fixed and unyielding characteristic of the jury verdict of acquittal exists by reason of the pronouncements of courts that the Double Jeopardy Clauses require it to exist. No state statute or act of Congress can change this. Only a constitutional amendment could do so. Justice Blackmun for the United States Supreme Court in *Bullington v. Missouri,* (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270, in referring to the immutability of the verdict of acquittal states:

> "The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.' *Green v. United States,* 355 U.S. [184], at 187-188, 78 S.Ct. [221], at 223-224 [2 L.Ed.2d 199].

See also *United States v. DiFrancesco,* 449 U.S. [117], at 136, 101 S.Ct. [426], at 437 [66 L.Ed.2d 328]. The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant.' *id.,* at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.' *Addington v. Texas,* 441 U.S. [418], at 424, 99 S.Ct. [1804], at 1808 [60 L.Ed.2d 323]." 451 U.S. at 445-446, 101 S.Ct. at 1861-1962.

That court went on to announce that the sentencing proceeding before the Missouri jury was like the trial on the question of guilt or innocence, and that as a conseqence thereof, a resultant jury rejection of the death

penalty, by reason of the Double Jeopardy Clause has the same immutable characteristic as the jury verdict of not guilty. Appellant contends that the jury recommendation against imposition of the death penalty under the Indiana death sentence statute should be treated in like manner, and that therefore the sentencing judge in making a final determination of the sentence can have no power to override it and impose death. I agree. The recommendation of the jury against death should have the force of an acquittal of the death sentence, and a recommendation that the death penalty be imposed should have the same force as a verdict of guilty.

Pursuant to the statute the jury reconvenes in court for the sentencing hearing. It is presided over by the judge. The defendant is present with his counsel and the state by its trial prosecutor. Evidence is presented in an adversarial setting. The jury receives the instruction from the court regarding the issues presented which include the question of whether an aggravating circumstance exists and whether it is of such a character as not to be outweighed by mitigating circumstances. The burden is upon the state to prove the aggravating circumstance beyond a reasonable doubt. The lawyers make final arguments to the jury. The jury retires to deliberate and returns into open court with its verdict in the form of a recommendation. This is a full scale jury trial in every sense of those terms. The defendant must surely feel that he is in "direct peril" of receiving the death penalty as he stands to receive the recommendation of the jury. *Cf., Green v. United States,* (1957) 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

The majority opinion concludes that the *Bullington* rationale does not apply to the Indiana situation because (1) the recommendation of the jury is not final and binding upon the sentencing judge, as was the case in Missouri, and (2) the recommendation does not necessarily reflect the jury's determination that the State failed

in its burden to prove an aggravating circumstance. I cannot agree that these two distinctions rob the Indiana death sentencing hearing before a jury of its trial character and force. It must be evident that the jury recommendation against imposition of death will have a great and profound persuasive force in determining what choice the judge will make at final determination time. The jury recommendation must be unanimous. *Judy v. State*, (1981), Ind., 416 N.E.2d 95. It is the personal judgment of twelve adult individuals of good will selected from a list comprised of a fair cross section of the community. The judge is also a member of that same community, sharing in its life and experience. The probability is very high that the judge, upon consideration of the recommendation will be brought to the brink of agreement with it in the very nature of things. The jury recommendation against death is so much like a binding decision, that constitutional protection against a second hearing before the judge on the propriety of death should be afforded. *Cf., Breed v. Jones*, (1975) 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346.

I also cannot agree with the analysis made by the majority of the underlying bases of the jury recommendation of no death in distinguishing this case from *Bullington*. According to the Indiana statute:

> "(e) . . . . The jury may recommend the death penalty only if it finds:
>
> (1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and
>
> (2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." Ind.Code § 35-50-2-9.

According to this statute, a jury recommendation of no death would have one of two necessary characteristics. Logically, it would either be based upon the jury's determination that the State had failed to establish historical

facts constituting an aggravating circumstance, or it would be based upon the jury's determination that the evidence presented had established historical facts constituting some mitigating circumstance. In either event, the judge's later procedure to decide whether the death penalty should be imposed, using "the same standards that the jury was required to consider" would result in a retrial upon the same questions of fact and any decision of the judge to override a jury recommendation of no death including as in the present case his express finding of no mitigating circumstances, would necessarily resolve one of those same questions of fact in a manner contrary to the manner in which the jury resolved it. Under our legal tradition, the determination of fact by a jury in favor of the defendant in a criminal case is not subject to being resolved at a later date by a judge in such a manner as to place the defendant in a worse position.

In the case of *United States v. DiFrancesco*, (1980) 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328, it is said:

> "The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action". 449 U.S., at 142, 101 S.Ct., at 440.

Here the statutory label is "recommendation". The substance beneath it is a factual adjudication and moral judgment of the jury, not a court master, not a court commissioner, but a jury of twelve, that the human qualities which warrant imposition of the death penalty are not present in Thomas N. Schiro. This favorable jury determination was awarded in a fair and open adversarial confrontation with the prosecutorial forces of the State. Since that award came from a jury after a full-blown trial, a judge, applying the same rational and specific standards as the jury was required to use, can-

not, consistent with the protection of the guarantee against double jeopardy, upon making contrary factual findings, take it away.

II.

The nunc pro tunc entry of the judge first notes that the verdict of the jury finding appellant Schiro guilty of murder while committing or attempting the crime of rape as charged in Count II was returned to court on September 13, 1981. The jury reconvened on September 15, 1981 and a death sentence hearing was held pursuant to Ind.Code § 35-50-2-9 resulting that day in a recommendation that the death penalty not be imposed. It further reflects a sentencing hearing was held on October 2, 1981, and continues in part pertinent to the judge's final determination that the sentence of death be imposed:

"On october 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumsatnces which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, Subsection [1] The Aggravating circumstances alleged.

> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery,

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty

of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) the mitigating circumstances that may be considered under this section are as follows . . . ."

At this point in the entry, the judge notes each mitigating circumstance and upon consideration of evidence rejects each possibility. After proceeding through that, the entry continues:

> "Since the State proved 'beyond a reasonable doubt that existence of at least (1) of the aggravating circumstances alleged', (Indiana Code § 35-50-2-9, Section 9[9] and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.
>
> The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise."

Indiana Code § 35-50-2-9, the death sentence statute, provides in pertinent part as follows:

> "(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b) of this section. *In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence*

of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

* * * *

(c) The mitigating circumstances that may be considered under this section are as follows:

* * * *

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation." (Emphasis added.)

Indiana Code § 35-50-2-9(e)(2) requires the sentencing judge to make the final determination of whether the death penalty should be imposed "based upon the same standards that the jury was required to consider." The standards referred to are the two listed in the same paragraph of the statute, the first of which is:

> "(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and"

The aggravating circumstance alleged in Count IIA is as follows:

> "(1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information . . . ."

According to the requirements of these provisions, it was necessary for the sentencing judge to *personally* conclude as a trier of fact that the State, at the sentencing hearing before the jury, proved to a moral certainty beyond a reasonable doubt that Thomas Schiro strangled and thus killed Laura Luebbehusen while committing or attempting to commit a rape upon her and at the time his mind had formed the *mens rea* identified by Ind.Code § 35-41-2-2 as "intentional", i.e., that he had a conscious objective to strangle and kill. I can find no direct statement in the judge's records and statement of reasons quoted above for imposing the death penalty that he *personally* reached this level of certainty upon each of these elements comprising

the aggravating circumstance. Quite obviously, until the point in time is reached that the judge conducts his own sentencing hearing to finally determine the sentence, he has not been called upon to make a factual determination beyond a reasonable doubt of the existence of the aggravating circumstance. The fact that the jury may have done so on some of the same elements in arriving at its verdict of guilty and in rejecting the plea of insanity as noted by the judge, cannot supplant the judge's obligation to do so. This finding of an aggravating circumstance by the sentencing judge is at the very core and heart of the final determination that death is to be imposed. The sentencing judge has not communicated to this Supreme Court Justice that he arrived at that finding at the required level of certainty. For this reason also, I cannot vote to permit his final determination to stand.

PRENTICE, J., concurs in part with concurring and dissenting opinion.

PRENTICE, Justice, concurring and dissenting.

I concur in the result reached by the majority with respect to its affirmance of the conviction of the defendant (appellant). I dissent, however, with respect to its affirmance of the sentence of death.

I.

I concur in part II of Justice DeBruler's dissenting opinion. The findings of the sentencing judge are devoid of any statement that he, himself, found, beyond a reasonable doubt from the evidence, that the defendant intentionally killed Laura Luebbehusen while committing or attempting to commit a rape upon her. I do not question that, under our standard for testing the sufficiency of the evidence upon appellate review, the evidence would have permitted such a finding, but it was not compelled. In the statement of his findings, the trial court judge correctly observed that one of the statutorily provided aggravating circumstances authorizing the imposition of a sentence of death is that the defendant committed murder by intentionally killing the victim. He proceeded to note, in particularity, that the jury had rejected Defendant's plea of insanity, and from this, he apparently concluded either that the jury had found, beyond a reasonable doubt, that the murder had been committed intentionally or that he was warranted in finding, beyond a reasonable doubt, from the jury's rejection of the insanity plea, that the murder had been committed intentionally. Neither would be correct.

Under the evidence, Defendant could have been found guilty of the crime charged whether he killed Laura Leubbehusen *intentionally* or knowingly or merely accidentally while committing or attempting to commit a rape. He was subject to the death penalty, however, only if he killed her *intentionally*. The interposition and rejection of the defense of insanity (mental disease or defect) Ind.Code § 35-41-3-6 (Burns 1979) simply has no relevance to the issue of whether or not the killing was done intentionally; yet, it is obvious that the trial court judge regarded it as significant, if not in fact controlling.

II.

The trial court judge also misconstrued the statute, Ind. Code § 35-50-2-9 (Burns 1979), as a mandate to the judge to impose the death sentence in the event that an aggravating circumstance was found to exist, beyond a reasonable doubt, and that mitigating circumstances, if any, were outweighed by it. Clearly, the statute merely authorizes the imposition of the death sentence, under such circumstances.

Given the existence of one or more of the enumerated aggravating circumstances and the absence of any of the first six (6) mitigating circumstances enumerated under

subsection (c) of the statute, the statute mandates neither a recommendation of death by the jury nor the imposition of the death penalty by the judge. Subsection (e) provides that the standards employed by the jury and those employed by the judge be the same, and the seventh (7th) enumerated mitigating circumstance is entirely subjective, i.e., "(7) Any other circumstances appropriate for consideration." It permits unbridled discretion to spare defendant from the supreme penalty.

The majority has said, "The language of the trial court may appear awkward but nowhere has the trial court * * * attempted to apply anything resembling a mandatory death penalty." I emphatically disagree with this statement. The statement of the trial judge, for the most part, was a recitation of the death sentence statute and certain evidence supportive of the sentence. There is nothing contained in the statement of the trial judge, however, that acknowledges that it is he who has determined that the defendant should die. There is nothing contained in the statement to indicate that he understood that it was his burden, under the law, to determine whether the defendant should live or die. Rather, the entire tenor of the findings that closed with the statements, "* * * the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.", reflects that the judge regarded himself as a mere conduit who had the unpleasant ministerial duty to announce a sentence fixed by statute.

The trial judge's comments amply demonstrate his misunderstanding of the standard he was required to apply in reaching the sentencing decision. Ind.Code § 35-50-2-9 affirmatively mandates the judge to employ the same standards that the jury was required to consider. That standard is stated as follows:

> "The jury *may* recommend the death penalty only if it finds: * * *."

In *Hoskins v. State*, (1982) Ind., 441 N.E.2d 419, 430 (Prentice, J., joined by Hunter, J., concurring) I noted that this standard does not require the imposition of the death penalty under any circumstances whatsoever and that, "It is not altogether illogical to conclude, therefore, that although a juror finds facts warranting the death penalty and no mitigating circumstances whatsoever, he *may*, nevertheless, recommend against imposing it without violating his oath." Similarly, the trial judge may refrain from imposing a sentence of death even though its imposition could not be held to be unreasonable under the circumstances. Moreover, it appears from the context of the judge's comments that, had he believed he had a choice, which he in fact did have under the statute, he would not have sentenced Defendant to death. The record reveals that the death sentence was imposed upon an erroneous standard. Consequently, the matter should be remanded for a new sentencing hearing. *State v. Watson*, (1982) La., 423 So.2d 1130, 1134-36.

In addition to being convinced that the sentence was imposed upon an erroneous standard, I am also convinced that the provisions of Ind.Code § 35-50-2-9, read in conjunction with Federal Due Process requirements concerning capital punishment, require the judge to give considerable weight to the jury's recommendation of mercy and this Court to review a death sentence, imposed contrary to the recommendation of the jury, upon a standard higher than a mere search for *manifest unreasonableness* as currently required under Ind.R.App.Rev.Sen. 2.

The nunc pro tunc order of February 23, 1983 does not state how the jury's recommendation was considered nor how much weight it was given by the judge.

The United States Supreme Court considers the jury "a significant and reliable objective index of contemporary values" with respect to the imposition of the death penalty. *Gregg v. Georgia*, (1976) 428 U.S. 153, 181, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859, 879 (plurality opin-

ion of Stewart, J.); *Accord Brewer v. State,* (1981) Ind., 417 N.E.2d 889, 909. Our Legislature echoed these sentiments when it mandated the trial court to consider the jury's recommendation, Ind.Code § 35-50-2-9(e), and by allowing the jury to consider "any other circumstances appropriate for consideration." Ind.Code § 35-50-2-9(c)(7), as a mitigating circumstance. In light of this acknowledged importance of the role of the jury, before a judge may impose a death sentence over a jury recommendation of no death sentence, that judge must articulate written findings, derived from clear and convincing evidence in the record, so that no reasonable person could differ with the determination. This standard, which has been utilized by the Supreme Court of Florida, *e.g. Cannady v. State,* (1983) Fla., 427 So. 723, 732 (per curiam); *Tedder v. State,* (1975) Fla. 322 So.2d 908, 910 (per curiam), preserves the defendant's interests in having obtained a favorable jury recommendation after an adversary proceeding. *See Bullington v. Missouri,* (1981) 451 U.S. 430, 445-46, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 270, 283. Any standard of less stringency detracts from the jury's contribution to the sentencing decision as recognized by the specific legislative directive that the judge consider the jury's recommendation. Given this command, and the statement of public policy that the death penalty is only discretionary even if all the requisite standards of proof are satisfied, in the case where the jury recommends mercy, the Legislatuure could not have intended that the judge merely disagree in order to override that recommendation. But for mere form, the trial judge may as well have discharged the jury upon receipt of the verdict upon the issue of guilt. It is clear that he either thought that the death sentence was required by law or that it was unalterably set in his mind. Hypothetically we could not accept a statement that proclaimed: "I find that the State has proven the existence of an aggravating circumstance authorizing a sentence of death, and I find no mitigating

circumstances. I further find that the defendant by erratic conduct during the trial, may have persuaded the jury to recommend mercy—or for reasons unknown, the jury may not be capable of rendering a rational recommendation upon the sentence determination. In any event, I have determined that a sentence of death is authorized by law, warranted by circumstances and preferred by me. A recommendation of a life sentence by the jury would not alter my decision. I, therefore, dispense with the jury hearing upon the sentencing phase of this matter, and I now order a sentence of death." From a "due process" standpoint, the hypothetical is no more repugnant than the procedure and findings actually employed in this case.

I am also concerned that the trial judge has displayed an apparent misunderstanding of the term "mitigating circumstances," as used in this statute. I am drawn to this conclusion by his statements: "As for mitigating circumstances, the Court finds none.", and, "* * * and the Court finds no mitigating circumstances to outweigh it (the aggravating circumstance)." Whether or not there were mitigating circumstances of such weight as to create a conflict in the mind of a reasonable man upon a determination of the appropriate sentence is not a matter upon which I intend to imply an opinion. However, the record is replete with unrefuted evidence of circumstances which a reasonable man could not but weigh in the balance in making a decision of such gravity. In the main, I refer to the sordid evidence of the defendant's character, a paragon of revulsion which society simply cannot tolerate unfettered. This same evidence, however, also portrays a sick, rejected and tormented creature who, although legally accountable for his loathsome and despicable conduct is, himself, a victim of forces essentially beyond his control. Whether or not he should be permitted to live by reason of these circumstances, despite his vile crime, is a matter upon which reasonable minds may differ; but human decency, the statute (any other circum-

stances appropriate for consideration), and due process considerations require that they be weighed in the balance. The denial of the existence of any mitigating circumstances is indicative of the trial judge's misconception of his sentencing responsibility that is likely to have resulted in grievous error.

Additionally, the judge's unbridled discretion to reweigh the evidence under the same standards considered by the jury, which action I am not convinced occurred here, potentially injects the same type of arbitrariness into the system which the Supreme Court has condemned. In cases where the judge and jury disagree, Florida's heightened standard of proof has been implicitly approved as an integral and significant factor in sustaining the constitutionality of the sentencing scheme. *Barclay v. Florida,* (1983) —— U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (plurality opinion); *Dobbert v. Florida,* (1977) 432, U.S. 282, 295-96, 97 S.Ct. 2290-2299, 53 L.Ed.2d 344, 357-58; *Proffitt v. Florida,* (1976) 428 U.S. 242, 249, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913, 921. In light of Ind.Code § 35-50-2-9 and the above cited authorities, I am compelled to conclude that this Court's failure to impose a heightened standard of proof upon a judge who seeks to override a jury recommendation of mercy runs afoul of Federal constitutional proscriptions concerning the due process required prior to imposition of the death penalty.

III.

Upon Issue No. V in the majority opinion, I believe that the appropriate standard for authentication has not been provided.

> "Anyone who is familiar with a person's writing from experience, having seen him write, or having carried on correspondence with him or from the opportunities of having frequently handled and observed the person's handwriting, is competent as a non-expert

> to give an opinion as to the genuiness of his signature or handwriting." *Spenser v. State,* (1958) 237 Ind. 622, 626, 147 N.E.2d 581, 583.

Dr. Abendroth testified that he had received three or four letters from Schiro, and he recalled some of their contents which he related to the court. He was also not equivocal about his ability to identify Defendant's handwriting nor to identify the exhibit at issue.

The majority appears to imply that, because Dr. Abendroth did not swear to knowledge of the origins of the first letters, he was not qualified to identify Defendant's handwriting. I do not understand the connection and note that in *Thomas v. State,* (1885) 103 Ind. 419, 427-29, 2 N.E. 808, 813-15, no such connection was required. Therein, though the witness produced ten letters, assertedly written by Defendant, before identifying the handwriting on the two letters, exhibits at issue, there was no testimony of how the witness knew that the accused had penned the first ten. Additionally, in this case, there is no showing that Mary Lee, whom the majority asserts could have provided the necessary authentication, did anything more than deliver the letter nor that she had any familiarity with Defendant's handwriting. Consequently, under the majority's ruling, in most cases, only the author of the letter would be able to authenticate it no matter how many times the witness, through whom a party sought to introduce the letter, had received letters from the author of the letter at issue. The law does not impose this onerous burden as the foundation for admitting a letter. *Thomas v. State, supra.*

However, the trial court has broad discretion in admitting or rejecting writings authenticated only by testimony of a witness who professes to recognize the author's handwriting. Thus, although I do not agree with the majority's conclusion that the letter was inadmissible, neither do I believe that the court committed error by rejecting it, as

it was not required to accept Dr. Abendroth's testimony as a sufficiently reliable authentication.

I vote to affirm the trial court's judgment with respect to the conviction of Defendant but to vacate the death sentence and remand the case for a new sentencing hearing.

SUPREME COURT OF INDIANA

No. 1084S423

THOMAS N. SCHIRO,
Appellant,

v.

STATE OF INDIANA,
Appellee.

June 28, 1985

Rehearing Denied Sept. 4, 1985

GIVAN, Chief Justice.

Appellant was convicted by a jury of Murder While Committing or Attempting to Commit Rape. The trial court sentenced appellant to death. The conviction and death sentence were affirmed by this Court on direct appeal. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047 (DeBruler, J., and Prentice, J., dissenting as to sentence), *cert. denied,* —— U.S. ——, 104 S.Ct. 510, 78 L.Ed.2d 699. Appellant's Petition for Post-Conviction Relief was denied. He now appeals.

The facts of this case were set out at length in the opinion on direct appeal. *Schiro, supra* at 1049-50. They will not be repeated here.

Appellant raises two issues in this appeal: whether the post-conviction court erred in finding the death penalty

was proper in light of his allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination; and whether the post-conviction court erred in finding appellant was not denied effective assistance of counsel.

In reviewing the denial of a post-conviction petition, this Court does not weigh evidence nor judge the credibility of witnesses. *Owens v. State* (1984), Ind., 464 N.E.2d 1277. The petitioner must satisfy this Court that the evidence as a whole leads unmistakably to a decision in his favor. *Bean v. State* (1984), Ind., 467 N.E.2d 671.

Appellant's first issue is divided into four subissues. In the first three subissues, which address the trial court's consideration of his behavior during the trial, appellant alleges: 1) that the information could not be relied upon because it was not introduced into evidence; 2) that because he did not testify, reliance on observations of his behavior volated his Fifth Amendment rights; and 3) that he was denied his right to effective assistance of counsel because defense counsel was not afforded an opportunity to comment on facts influencing the sentencing decision. The fourth subissue concerns a comment made by the trial judge which appellant argues demonstrates the judge was biased and therefore unable to objectively render the sentencing determination.

Upon review of appellant's direct appeal, this Court found the trial court's original findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro, supra* at 1056. We ordered the court to make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind.Code § 35-50-2-9. *Id.* In its *nunc pro tunc* entry the court found that the aggravating circumstances set out in Ind.Code § 35-50-2-9(b)(1) was proved beyond a reasonable doubt.

The court then stated that it found no mitigating circumstances, and addressed each of the possible mitigating circumstances delineated in Ind.Code § 35-50-2-9. In reference to the statutory mitigating circumstances concerning a defendant's mental or emotional condition, subsection (c)(2), and impairment of a defendant's capacity to appreciate the criminality of his conduct, subsection (c)(6), the court made the following finding:

> "This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

Appellant contends this finding constitutes the court's primary basis for sentencing him to death after the jury recommended the death penalty not be imposed. He argues that "obviously" the court based its death penalty judgment on its observations, representing an "absolute denial of due process."

We cannot agree with appellant's conclusory assertion that the court based its judgment on observations of his behavior. The court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt. *Schiro, supra* at 1058. It addressed each of the possible mitigating circumstances delineated in the statute. Regarding appellant's mental state, the court made additional findings which cited testimony by psychiatric experts and evidence of appellant's attempt to conceal his crime. *Id.* at 1059. While the court's observations were certainly germane to its consideration of the jury's recommendation,

it cannot be said its finding that appellant may have misled the jury constituted the basis for imposition of the death penalty.

Neither can we agree with appellant's contention that consideration of his behavior was impermissible because it was information not admitted into evidence. It is axiomatic that a trial court, within its discretion, can consider a defendant's behavior in the courtroom, regardless of whether the jury is present. The court can properly consider such "non-evidentiary" information as the presentence investigation report and its perception of a defendant's remorse or lack thereof. We find no authority to support the conclusion appellant would have us draw, that a judge in a capital case is precluded from considering a defendant's behavior during the course of the trial if evidence of such behavior is not admitted into evidence.

Appellant nevertheless argues that under *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393, the death penalty is invalid. In that case a Florida jury recommended a life sentence. The trial judge, as in the instant case, overrode the jury's recommendation and sentenced the defendant to death. In imposing the death penalty the judge stated that his decision was based in part on a presentence report which contained a confidential portion not available to the defense. *Id.* at 353, 97 S.Ct. at 1202, 51 L.Ed.2d at 398-99.

The United States Supreme Court vacated the death sentence. The Court concluded the petitioner was denied due process because the death sentence was imposed, at least in part, on the basis of information which the petitioner had no opportunity to deny or explain. *Id.* at 362, 97 S.Ct. at 1207, 51 L.Ed.2d at 404. The Court found that because the confidential portion of the report was not part of the record on appeal, the Florida Supreme Court was unable to consider "the total record" in its review. *Id.* at 361, 97 S.Ct. at 1206, 51 L.Ed.2d at 404.

The instant case is distinguishable. At the sentencing hearing the judge expressly stated his observations of

appellant's behavior and its relevance to the sentencing determination. Appellant thus had an oportunity to challenge the observations, and the judge's conclusion based thereon, either contemporaneously or upon filing his motion to correct error. Further, this Court explicitly considered the controverted finding on review of appellant's direct appeal. *Schiro, supra* at 1057, 1059.

We also note that testimony was introduced at trial by both sides in reference to appellant's prior rocking behavior. Appellant introduced testimony that he rocked in the presence of witnesses. Despite appellant's contention of lack of notice of the court's conclusion based on such behavior, defense counsel, who was certainly aware of the continual rocking motions referred to by the court, could have presented additional evidence at the sentencing hearing pertaining to the statutory mitigating circumstances. *See* Ind.Code § 35-50-2-9(d). The due process violation found in *Gardner, supra* is not present here.

Appellant contends that because under the Fifth Amendment of the United States Constitution and Art. 1, § 14 of the Indiana Constitution the general trial demeanor and manner of a defendant who does not take the stand cannot be considered against him and no inference can be drawn from his failure to testify, the trial court's consideration of his behavior violates his right against self-incrimination.

This argument is without merit. The sole case cited by appellant, *People v. Ramirez* (1983), 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31, is inapposite to the circumstances of the instant case. In *Ramirez* the State's attorney commented to the sentencing jury that the defendant had "sat silent" and offered no explanation for the crime. The Supreme Court of Illinois' decision to vacate the death sentence was based on the prosecutor's comment and the trial judge's refusal to properly instruct the jury not to consider the defendant's decision not to tesufy at the sentencing hearing. *Id.* at 472-73, 457 N.E.2d at 47.

Although the impermissible comment in *Ramirez* was couched in terms of the defendant's "conduct", the crux of the constitutional violation was the impropriety of commenting on the defendant's decision not to testify. Here, the trial judge's observations were directed to two of the possible mitigating factors and to the jury's recommendation, not to appellant's exercising of his constitutional rights. The record does not reveal any comment by the prosecution or by the court made in reference to appellant's decision not to testify at the sentencing hearing.

In an argument related to his contention that the trial court erred in considering non-evidentiary information, appellant asserts he was denied his Sixth Amendment right to effective representation upon the sentence being based on information which he had no opportunity to deny or explain.

This argument is also without merit. At the sentencing hearing the trial judge specifically stated his observations and their relevance to the sentencing determination. Counsel thus had the opportunity to contemporaneously object to or rebut the judge's observations. As the finding was stated explicitly and openly, we cannot conclude that the court's reference to its observations of appellant's demeanor precluded defense counsel from commenting on facts influencing the sentencing decision. *See Gardner, supra*, 430 U.S. at 360, 97 S.Ct. at 1206, 51 L.Ed.2d at 403.

In his fourth subissue appellant alleges the trial judge was biased. This allegation is premised on a comment made by the judge to a newspaper reporter which appellant argues supports the conclusion the judge had predetermined that the death penalty would be imposed.

The newspaper reporter, Jocelyn Winnecke of the *Evansville Sunday Courier and Press*, testified at the post-conviction hearing that the judge, The Honorable Samuel R. Rosen, remarked to her after the guilty verdict was returned that "we're going to fry the boy." Judge Rosen

testified that before entering the courtroom to receive the guilty verdict he said "soon we'll know whether he'll live or die." Judge Rosen also testified that he would never use the word "fry" in that context and that he did not make up his mind until the date of sentencing whether the death penalty would be imposed. Vanderburgh County Deputy Prosecutor Jerry Atkinson, who prosecuted the case, was privy to the conversation between Winnecke and Judge Rosen. His recollection at the hearing was that Judge Rosen stated "I think the boy is going to die."

Appellant argues that the judge's statement, coupled with the judge's reliance on his personal observations, conclusively reflects bias and a predetermination of the death sentence. As stated *infra*, the observations were properly relied upon by the judge and in no way represent a loss of objectivity. The comment made by Judge Rosen, in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious. The post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge.

Appellant also alleges he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to assure that the jury received all the necessary verdict forms.

In addressing the issue of competency of counsel, this Court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Bailey v. State* (1985), Ind., 472 N.E.2d 1260; *Elliott v. State* (1984), Ind., 465 N.E.2d 707. We apply a two-step test comprised of a "performance component" and a "prejudice component." Under the first step, a defendant must show counsel's alleged acts or

omissions fell outside the wide range of reasonable professional assistance. If the defendant satisfies the first step of the test, he must then establish that counsel's errors had an adverse effect upon the judgment. *Richardson v. State* (1985), Ind., 476 N.E.2d 497; *Lawrence v.* State (1984), Ind., 464 N.E.2d 1291.

Trial counsel did not submit verdict forms for the offenses of guilty of murder while committing and attempting to commit rape but mentally ill and guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill. *Schiro, supra* at 1062. Appellant contends that because the jury returned a felony murder guilty verdict on a count for which they were not supplied with a guilty but mentally ill verdict form confidence in the outcome of his trial was undermined.

The issue was raised in appellant's direct appeal in the context of trial court error in failing to supply the jury with all the necessary verdict forms. *Id.* We determined that appellant's Instruction No. 2, which informed the jury that the possible verdict of guilty but mentally ill was submitted to them on all counts of the information, sufficiently informed the jury that the mentally ill verdict "applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder." *Id.* at 1063. As appellant failed to show any prejudice, there was no reversible error on that issue. *Id.*

In applying the aforementioned two-step test, it is not necessary to address both components if the defendant makes an insufficient showing as to one. *Richardson, supra* at 501 (citation omitted). Because the instruction regarding the encompassing applicability of the guilty but mentally ill verdicts cured the potentially prejudicial impact of the omission of the verdict forms, appellant is unable to establish that counsel's omission had an adverse effect upon the judgment. The post-conviction court did not err in finding that appellant was not denied effective assistance of counsel.

The trial court is in all things affirmed.

PRENTICE and PIVARNIK, JJ., concur.

DeBRULER, J., dissents with separate opinion.

HUNTER, J., not participating.

DeBRULER, Justice, dissenting.

Petitioner-appellant was convicted of murder and sentenced to death. When the trial judge imposed the death sentence on October 2, 1981, he stated that he was relying in part on his personal observations of appellant's conduct in the Court's outer chambers, during the trial on the question of guilt or innocence, when the jury was not present. The trial judge had not previously disclosed to counsel for the parties that he had made those observations and that he would rely upon them in making the life or death decision. Thus, the decision itself was arrived at before counsel knew of this unique basis and had all opportunity to respond to it. This procedure does not satisfy the constitutional requirement of the due process of law.

In the aforementioned statement the judge said:

> "This Court personally observed the Defendant, while the jury was present, making continued rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

This is the justification of the judge's rejection of the jury's recommendation of life. By this revelation, the judge dicloses that he deemed himself by reason of his

observations, to be in a better position than the jury to make the life-death decision. I believe this was error.

In *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 the sentencing judge indicated that he selected death in part because of information contained in a presentence report, which information had not been disclosed to the defendant or his counsel and to which the defendant had no opportunity to respond. The U.S. Supreme Court set the sentence aside. Here, the opportunity to respond to Judge Rosen's statement did not arise until after he had made and formally announced his decision to override the jury recommendation of life and impose death.

The standards of due process are flexible and dictated by the circumstances and competing interests involved. A hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. The interests of the defendant and the state in an accurate ascertainment of facts upon which a sentence of death may be given, are at the highest level. We are bound to adopt and adhere to procedures which insure against the arbitrary deprivation of life.

In these circumstances, the opportunity to respond to the factual information supplied by the judge's private observations, came after that factual information was used and the life or death decision was reached. This opportunity was not meaningful in time. The opportunity to respond was restricted to a request to reconsider a decision which had already been reached and publicly announced. Much judicial time and energy had already been invested in arriving at that decision. One need only compare the process of reaching a decision with the process

of retreating from a decision, to appreciate the reality of the restriction resulting from the procedure employed here. In sum, to permit the personal observations of the judge, this new matter, to be swept in at the last moment, without prior notice, and to be used as a critical part of the basis for the sentencing court's decision, is contrary to my sense of fairness.

IN THE CIRCUIT COURT
FOR THE COUNTY OF BROWN
STATE OF INDIANA

Cause No. 81-CR-243

THOMAS N. SCHIRO

v.

STATE OF INDIANA

ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

[Filed January 15, 1988]

This Court held an evidentiary hearing on October 30, 1987, on issues raised by a Second Petition for Post-Conviction Relief filed by Messrs. Alex Voils and David Hennessy on behalf of the Petitioner Thomas N. Schiro. The Petitioner appeared in person and by his attorney, Alex Voils, and the State of Indiana appeared by Robert J. Pigman, Prosecuting Attorney of Vanderburgh County. Evidence was presented on said petition and arguments were presented to the Court. At the conclusion of the hearing, the Court took the matters under advisement to review testimony and exhibits presented at the hearing. The Court has also reviewed the post-hearing briefs submitted by Petitioner and Respondent and the reply brief of the Petitioner.

History of Proceedings

On September 12, 1981, the Defendant was found guilty of the offense of murder while committing and attempting to commit the crime of rape under Count II of the charging information, and the trial Court entered judgment of conviction on the verdict of the jury. On

September 15, 1981, a hearing was held pursuant to the provisions of I.C. 35-50-2-9, at which the jury unanimously recommended that the death penalty not be imposed. The trial Court scheduled the cause for sentencing on October 2, 1981. At the sentencing hearing held on October 4, 1981, the trial Court overruled the recommendation of the jury and ordered that a sentence of death be imposed.

On appeal of the cause, the Indiana Supreme Court held that the original findings of the trial Court did not set out clearly and properly the trial Court's reasons for imposing the death penalty. The Supreme Court ordered the trial Court to make written findings in the case, setting out by *nunc pro tunc* entry the aggravating circumstances which were proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified by I.C. 35-50-2-9. The Petitioner was given an opportunity to contest the *nunc pro tunc* entry of the trial Court, and the State was given an opportunity to oppose the Petitioner's brief.

On February 22, 1983, the trial Court entered its pronouncement of sentence, incorporating findings as directed by the Indiana Supreme Court, *nunc pro tunc*, as of October 2, 1981. The trial Court imposed a sentence of death and ordered that the Petitioner be executed.

On appeal, the Supreme Court of Indiana affirmed the decision of the trial Court and remanded the case to the trial Court for the purpose of setting a date for the death sentence to be carried out. *Schiro v. State*, 451 N.E.2d 1047 (Ind.1983). The Supreme Court held, in part, that the Indiana death penalty statute is constitutional; that the trial Court did not err in imposing the death penalty; that it was not reversible error to omit certain verdict forms from consideration by the jury; that the *nunc pro tunc* findings made by the trial Judge were not improper and clearly set out the reasons the trial Court imposed the death penalty; that the Indiana death penalty statute permits a trial Judge to override a jury recommendation

that death not be imposed; and that the death penalty was not arbitrarily or capriciously applied to the Petitioner.

On November 28, 1983, the United States Supreme Court denied the Petitioner's writ of certiorari to vacate the death penalty. *Schiro v. Indiana*, 464 U.S. 1003, 104 S.Ct. 510. 78 L.Ed.2d 699 (1983).

On May 11, 1984, an Amended Petition for Post-Conviction Relief was filed by the Petitioner alleging denial of a fair trial at the sentencing stage of the proceedings because of partiality, bias and prejudice against the Petitioner on the part of the trial Judge.

On May 29, 1984, the Petitioner's Petition for Post-Conviction Relief was denied by Brown County Special Judge James M. Dixon.

The Petitioner appealed the denial of post-conviction relief to the Indiana Supreme Court. On June 28, 1985, that Court affirmed the trial Court's denial of relief. *Schiro v. State*, 479 N.E.2d 556 (Ind.1985).

On February 24, 1986, the United States Supreme Court denied the Petitioner's writ of certiorari to vacate the death sentence. *Schiro v. Indiana*, —— U.S. ——, 106 S.Ct. 1247 (1986).

Thereafter, the Petitioner instituted a petition for writ of habeas corpus in the United States District Court, Northern District of Indiana, South Bend Division. Judge Allen Sharp remanded to state court allowing the Petitioner to exhaust all available state remedies as required for federal habeas corpus proceedings. State remedies must be exhausted before federal habeas corpus can be sought. 28 U.S.C. Section 2254(b), *Ex Parte* Hawk, 321 U.S. 114 (1944).

On March 5, 1987, the Petitioner filed his Second Post-Conviction Relief Petition. The Petitioner filed a timely Motion for Change of Venue from the trial Court and this Court appeared, qualified and assumed jurisdiction on March 25, 1987.

On March 9, 1987, the State filed a Motion to Dismiss Petition for Post-Conviction Relief. This Court held a

hearing in the Brown Circuit Court on the Motion to Dismiss on July 15, 1987. The Petitioner appeared in person and by his attorney, Alex Voils, and the State of Indiana appeared by Chris Lenn, Deputy Prosecuting Attorney of Vanderburgh County.

On July 31, 1987, this Court ruled on the State's Motion to Dismiss Petition for Post-Conviction Relief. Issues 9(j) through 9(m) in the Petitioner's Second Post-Conviction Relief Petition were dismissed on the grounds of res judicata and prior adjudication. Issues raised and determined on appeal were not available as grounds for post-conviction relief and cannot be reviewed in post-conviction relief proceedings. Rule PC 1, Section 8, *Cambridge v. State*, 468 N.E.2d 1273 (Ind.1984).

Issues 8(a-c) and 9(a-i) were not dismissed and form the basis of the Petitioner's Second Post-Conviction Relief Petition. The State raised the defense of waiver for issues not previously raised. When the State raises a defense of waiver under Rule PC 1, Section 8, and the Petitioner has claimed inadequate appellate representation, the hearing judge is required to make a preliminary determination as to the competency of appellate counsel before reaching the otherwise waived ground for relief raised in the Post-Conviction Relief Petition. *Davis v. State*, 328 N.E.2d 768, 774 (Ind.1975).

Full hearing on the Petition for Post-Conviction Relief was scheduled for September 11, 1987. Petitioner's counsel, Alex Voils, filed a Verified Motion for Continuance and the hearing was rescheduled for October 30, 1987. On that date, this Court held a hearing on the remaining issues of the Post-Conviction Relief Petition in the Brown Circuit Court.

As grounds for vacating, setting aside or correcting the conviction and sentence, the Petitioner alleges the following:

8(a). That previous post-conviction relief counsel was ineffective and inadequate for failing to raise the follow-

ing grounds for reversal of the judgment of conviction and correction of sentence.

(b). That Defendant was denied effective assistance of counsel in preparing and presenting his defense and the appeal from the conviction.

(c). That Petitioner was denied due process of law, the equal protection of the laws and fundamental fairness and his constitutional rights thereof as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The general areas of allegations in support of the grounds set forth above are as follows:

1. That the cause was neither adequately investigated nor properly prepared for trial.
2. That the trial Court failed to sequester or adequately admonish the jury.
3. That trial counsel failed to present evidence at either the sentencing stage of the bifurcated trial or the sentencing hearing.
4. That issues, preserved at the request of Petitioner in his Motion to Correct Errors, were waived on appeal.
5. That Petitioner was tried upon defective charging information and proceeded to the death penalty stage upon verdicts indicating a "nonintentional" killing.
6. That Petitioner was denied his right to confront the witnesses and evidence against him as applied to the testimony of Linda Gail Summerford and State's Exhibit 62.
7. That Petitioner was not provided, as an indigent, competent psychiatric assistance.
8. That members of the jury were allowed to view Defendant shackled during court recesses.

The primary focus of the Petitioner's argument is based on the eight general areas of allegations and the weave of ineffective assistance of counsel to each allegation individually. The Petitioner contends he was denied effective assistance of post-conviction counsel by their failure to present the trial counsel and appellate counsel's ineffective

assistance of counsel to either the post-conviction trial Court or the applicable appellate tribunals. Petitioner asks that the Post-Conviction Relief Petition be granted and the matter set for retrial.

This Court makes specific findings of fact and conclusions of law on each allegation presented by the Petitioner as required by Indiana post-conviction relief procedures. Rule PC 1, Section 6. *Robinson v. State*, 493 N.E.2d 765, 766 (Ind.1986).

Allegation 1, The Cause was Neither Adequately Investigated Nor Properly Prepared for Trial.

Findings of Fact

The first allegation raised by the Petitioner states that the cause was-neither adequately investigated nor properly prepared for trial. First, Petitioner contends that trial counsel did not request and did not receive a private investigator to aid in preparation of the cause for trial. Petitioner claims that an investigator would have physically traced the Petitioner's actions on the date of Laura Lubbenhusen's murder. Petitioner claims that an investigator would have found evidence of the consensual nature of Ms. Lubbenhusen's action by interviewing witnesses in an unnamed Evansville area bar and liquor store. Petitioner asserts that evidence of the consensual nature of the victim's actions should have been offered as a mitigating factor when considering the death penalty in the sentencing phase of the bifurcated trial. I.C. 35-30-2-5 (c)(3).

Donald Campbell, a former Indianapolis police detective and experienced private investigator, testified that an investigation should have definitely been done in an effort to find witnesses who saw the Petitioner and victim together. In a recent investigation, Campbell was unable to find the bar, liquor store or witnesses. Petitioner could not remember and did not disclose the name of any bar

or liquor store that he visited with the victim on the night of Laura Lubbenhusen's murder.

The second area of alleged inadequate investigation and preparation concerns the trial testimony of the Petitioner's former girlfriend, Mary T. Lee. Petitioner testified that Lee told him that the State had threatened Lee to either testify incriminating the Petitioner or she would lose her children to the authorities. Petitioner claims to have reported this incident to trial counsel who failed to investigate and cross-examine Lee about the threat. The trial Court found aggravating circumstances in Lee's testimony.

Detective Campbell testified that he was unable to locate Mary T. Lee in a recent investigation. Petitioner asserts that this is newly discovered evidence.

Conclusions of Law

In post-conviction proceedings, the Petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Rule P.C. 1, Section 5.

The trial judge in post-conviction proceedings is the sole judge of the weight of the evidence and the credibility of the witnesses. *Popplewell v. State*, 428 N.E.2d 15, 16 (Ind.1981). This Court gives little weight to the credibility of Petitioner's testimony. The Petitioner has no motive to tell the truth and every motive to fabricate. Psychiatrists at the original trial testfied that the Petitioner engages in manipulative and deceitful behavior. During testimony at the second post-conviction relief hearing, the petitioner, on explaining on cross-examination why he failed to bring certain documents, stated under oath that he did not know why he was transported from X Block, death row, at Michigan City Prison to Brown County on October 30, 1987. From Petitioner's well-prepared testimony and notification from his attorney, it was apparent the Petitioner must have known he was transported for his second post-conviction relief hearing and not to see

Brown County's fall foliage. Much of the Petitioner's allegations and testimony were based on a totem pole of out-of-court statements by declarants not present to testify. For those reasons, this Court questions the reliability of Petitioner's testimony.

To prevail on a claim of ineffectiveness of counsel, Petitioner must prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Petitioner also must prove that counsel's failure to function was so prejudicial as to deprive him of a fair trial. A fair trial is denied when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Lawrence v. State*, 464 N.E.2d 1291 (Ind.1984).

In meeting this burden, Petitioner must overcome by strong and convincing evidence a presumption that counsel had prepared and executed his client's defense effectively. *Williams v. State*, 508 N.E.2d 1204 (Ind.1987).

A determination of ineffectiveness of counsel is factually oriented. This Court will not speculate about what may have been the most advantageous strategy and isolated bad tactics or inexperience does not necessarily amount to ineffective assistance of counsel. *Mato v. State*, 478 N.E.2d 57 (Ind.1905); *McChristion v. State*, 511 N.E.2d 297 (Ind.1987).

Judicial scrutiny of counsel performance is highly deferential and should not be exercised through the distortion of hindsight. *Nadir v. State*, 505 N.E.2d 440 (Ind.1987).

The Petitioner failed to demonstrate ineffective assistance of counsel by inadequate investigation and improper preparation for trial. The Petitioner failed to meet either prong of the *Strickland v. Washington* test by a preponderance of the evidence.

Appellate and trial counsel's representation did not fall below prevailing professional norms and Petitioner

was not deprived of a fair trial by the omission of evidence of the consensual nature of the victim's action during the sentencing state of trial. The Petitioner's claims of visits to a bar or liquor store with a consenting Laura Lubbenhusen were sketchy. The physical evidence at the scene of the crime and the victim's strong aversion toward men make it understandable why trial counsel chose not to use consent as a mitigating factor and why appellate counsel did not pursue this issue.

Trial counsel's failure to investigate the allegations of coercion against Mary T. Lee and appellate counsel's decision not to pursue this issue did not constitute ineffective assistance of counsel. The alleged coercion rests entirely on the questioned credibility of the Petitioner. Much of Lee's testimony was beneficial to the Petitioner. It is plain why counsel did not follow up the unsubstantiated accusation of coercion made against the Vanderburgh County Prosecutor's Office.

Allegation 2, the Trial Court Failed to Sequester or Adequately Admonish the Jury.

Findings of Fact

Petitioner testified that he indicated to counsel that he wanted a sequestered jury. Petitioner further testified that his counsel told him there was no need to have a sequestered jury. The record does not indicate that Petitioner made such a request and no evidence exists to dispute Petitioner's claim that he requested a sequestered jury.

Georgia Kay Brown, an Indianapolis private investigator, gathered newspaper articles concerning the Petitioner's trial available in Brown County. The media accounts of the trial from the *Columbus Republic* and *Bloomington Herald-Telephone* were admitted into evidence. Brown testified she could not locate five of the 12 jurors. None of the jurors were present at the second post-conviction relief hearing. Petitioner further contends

that the jury was not properly or adequately admonished by the trial Judge.

Conclusions of Law

If requested in a timely fashion, the Defendant has an unequivocal right in a capital case to have the jury sequestered. *Lowery v. State*, 434 N.E.2d 868 (Ind. 1982).

The decision not to move for jury sequestration in a capital case does not by itself constitute ineffective assistance of counsel. The decision not to request sequestration of the jury is strategic. Counsel is under no duty to request sequestration in a capital case. The petitioner must show prejudice by the failure to move for jury sequestration. *Burris v. State*, 465 N.E.2d 171 (Ind. 1984).

The Petitioner has failed to rebut the presumption of competence on the failure of counsel to request sequestration of the jury. There was no showing by a preponderance of the evidence that the failure to request the sequester of the jury had any effect on the fairness of the Petitioner's trial.

The trial Judge adequately and properly admonished the jury on at least seven occasions.

Allegation 3, Trial Counsel Failed to Present Evidence at Either the Sentencing Stage of the Bifurcated Trial or the Sentencing Hearing.

Findings of Fact

Petitioner asserts that counsel presented no evidence of mitigating circumstances at the sentencing stage of the bifurcated trial or the sentencing hearing. Petitioner testified that he asked counsel to allow his parents to present mitigating factors. Petitioner claims that counsel failed to include the victim's consensual actions as a mitigating factor.

Conclusions of Law

The petitioner failed to overcome the presumption of effective assistance of counsel by a preponderance of the evidence.

Trial counsel incorporated mitigating factors admitted into evidence during trial at the sentencing stage of the bifurcated trial. Trial counsel filed objections to the presentence report and moved to correct the report by including mitigating circumstances. Trial counsel presented mitigating circumstances during trial through the testimony of two psychiatrists, the cross-examination of Petitioner's former girfriend, Mary T. Lee, the testimony of Petitioner's father, the social, cultural, educational, religious background of the Petitioner, his alcohol and drug addiction, the Petitioner's age, the Petitioner's attempts at rehabilitation and Petitioner's emotional and behavioral problems. Trial counsel's presentation of mitigating factors was adequate and professionally reasonable. Petitioner fails to meet the *Strickland v. Washington* standard on this allegation.

Allegation 4, Issues Preserved at the request of Petitioner in his Motion to Correct Errors were Waived on Appeal.

Findings of Fact

Petitioner testified that seven issues preserved at his request in the Motion to Correct Errors were waived by appellate counsel and his first post-conviction relief counsel without his knowledge. Those issues include:

1. The Court erred in overruling and denying the Defendant's motion to dismiss.
2. The Court erred in overruling the Defendant's objection to the admission into evidence of State's Exhibit 47, a coat recovered from the Half-Way House.
3. The Court erred in sustaining the State's objection to the admission into evidence of Defendant's Exhibit B.

4. The court erred in giving to the jury the Court's preliminary instruction concerning the burden of proof on the issue of insanity, which instruction was not numbered.
5. The court erred in giving to the jury the Court's final instructions numbered 3, 9, 11 and 15.
6. The Court erred in modifying the Defendant's tendered instruction numbered 15.
7. The Court erred in overruling and denying the Defendant's motion to reject the verdict and reinstruct the jury.

Conclusions of Law

The decision of appellate counsel not to pursue certain issues preserved by the Motion to Correct Errors was strategic and tactical. This Court will not second guess appellate counsel's decision to omit and waive certain appealable issues. When incompetency of counsel is alleged, there is a strong presumption of adequate legal assistance. *Whitlock v. State*, 456 N.E.2d 717, 718 (Ind. 1983). The Petitioner has not overcome this presumption by a preponderance of the evidence. The Petitioner has not met the performance or prejudice prong of the *Strickland v. Washington* test on this allegation.

Allegation 5. Petitioner was Tried Upon Defective Charging Informations and Proceeded to the Death Penalty Stage Upon Verdicts Indicating a "Non-intentional" Killing.

Findings of Fact

Petitioner claims that he was convicted upon a defective charging Information where no mens rea was alleged. The Defendant was convicted under Count II, Murder, I.C. 35-42-1-1(2). Petitioner claims that he was not charged or found guilty of intentionally killing the victim and therefore does not fit the aggravating factor of Indiana's death penalty statute. Petitioner contends that trial counsel was ineffective for allowing the defective Information to proceed to trial.

Conclusions of Law

Petitioner claims the charging information filed was defective. Omitting captions and formal parts, Count II of the Information reads as follows:

> Thomas N. Schiro on or about February 5, 1981, did kill Laura Luebbehusen by beating, striking and strangling the said Laura Leubbehusen, thereby causing her to die by asphyxiation, while the said Thomas N. Schiro was committing and attempting to commit the crime of rape, to-wit: knowingly and by the use of force and the threat of force, having sexual intercourse with the said Laura Luebbehusen, a member of the opposite sex, without the consent of the said Laura Laubbehusen, all in violation of I.C. 35-42-1-1(2).

An Information must state the crime in words of the statute or words that convey a similar meaning. *Burris v. State*, 465 N.E.2d 171, 181 (Ind.1984).

The language of the Information was sufficiently certain to enable the accused, the trial court and the jury to determine the crime for which conviction was sought.

Indiana's death penalty statute is in part at I.C. 35-50-2-9:

> Death Sentences—(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.
>
> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery.

The State filed a separate request for the death penalty which specifically identified the aggravating circumstances.

> The crime of Murder, as charged in Count II of the Information filed herein, was committed by the defendant, Thomas N. Schiro, and the following aggravating circumstances exist, which justify the imposition of the death sentence.
>
> (1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information, constituting an aggravating circumstance justifying imposition of the death penalty, as set forth in I.C. 35-50-2-9(b)(1).
>
> WHEREFORE, the State of Indiana prays that the penalty of death be imposed on the defendant, Thomas N. Schiro.

The language of the Information was sufficiently certain to enable the accused, the trial Court and the jury to determine the aggravating circumstances of the death penalty statute.

The Petitioner was convicted for felony murder. The intent to kill is not an element of felony murder. *Pawloski v. State*, 380 N.E.2d 1230 (Ind.1978). The only intent required to be proved in a prosecution for felony murder is the intent to commit the underlying felony. *Brown v. State*, 448 N.E.2d 10 (Ind.1983).

The intent for the underlying felony of rape was adequately alleged in the Information and proved. The Information alleging the death penalty was adequate and satisfied the requirement of intentionally.

The Court finds no ineffective assistance of counsel under this allegation.

Allegation 6, Petitioner was Denied His Right to Confront the Witnesses and Evidence Against Him as Applied to the Testimony of Linda Gail Summerford and State's Exhibit 62.

Findings of Fact

Petitioner claims that trial counsel's failure to cross-examine Linda Gail Summerford and dispute State's Exhibit 62 were extremely prejudicial to him. Linda Gail Summerford, a surprise State witness, testified that the Petitioner committed an uncharged rape on her. State's Exhibit 62 was a photo array Summerford used to identify Petitioner as the man who raped her. The Petitioner's rape of Summerford was considered an aggravating circumstance by the trial Judge in imposing the death penalty over the jury's recommendation.

Conclusions of Law

The decision not to cross-examine Summerford and contest the photographic array was tactical. Petitioner has not overcome the presumption that counsel prepared and executed Petitioner's defense effectively by a preponderance of the evidence. This Court will not speculate on what should have been the defense's proper strategy. A fair trial was not denied the Petitioner by this tactical decision. Prior to Summerford's testimony, Dr. Osanka testified that the Defendant committed as many as 23 acts of rape. The decision not to challenge Summerford did not meet the *Strickland v. Washington* standards for ineffective assistance of counsel.

Allegation 7, Petitioner was Not Provided as an Indigent, Competent Psychiatric Assistance.

Findings of Fact

Petitioner filed a request to have a psychiatric expert appointed to aid in the preparation and presentation of his defense. This request was denied. A psychiatrist, Dr. Osanka, was hired and paid for by Petitioner's parents.

Dr. Osanka was instrumental in the preparation of Petitioner's defense. Petitioner claims that Dr. Osanka indicated to Petitioner and his family that a sizable sum of money would have to be paid to the psychiatrist for testimony favorable to the Petitioner. Trial counsel was informed about this attempted bribe but did nothing about it according to the Petitioner.

Conclusions of Law

Two psychiatrists were appointed as Court's witnesses to examine the Defendant and testify at trial. The Petitioner was provided adequate and competent psychiatric assistance for his insanity defense. Contrary to what the Petitioner suggested in his post-conviction relief testimony, competent psychiatric assistance does not mean that expert evaluations and opinions must be rendered in the defendant's favor.

The alleged shakedown or blackmail by Dr. Osanka is based completely on the questioned credibility of the Petitioner. The Petitioner's testimony was based on layers of out-of-court statements by declarants not present to testify. Petitioner's parents were not called to corroborate the alleged shakedown.

This Court finds that the Petitioner was not denied competent psychiatric assistance and was not denied effective assistance of counsel on this allegation.

Allegation 8, Members of the Jury were Allowed to View Defendant Shackled During Court Recesses.

Findings of Fact

Petitioner claims to be prejudiced by being viewed in manacles and shackles by the jury on breaks in the proceedings and when being led in or out of the trial courtroom. Trial counsel was aware that the Petitioner was being viewed in shackles by the jury and made no objections. Petitioner complained to counsel about being seen by the jury in shackles.

Conclusions of Law

The fact that a defendant has been seen by jurors while being transported in handcuffs is not a basis for reversal, absent a showing of actual harm. *Hartlerod v. State*, 470 N.E.2d 716 (Ind.1984). Reasonable jurors could expect the Petitioner to be in police custody while in the hallway of the courthouse. *Jenkins v. State*, 492 N.E.2d 666 (Ind.1986). A reasonable jury could assume that the Petitioner would be in police custody and under custodial restraint during breaks in the trial and traveling to and from the courtroom. The Petitioner has made no showing of actual harm and has not met the *Strickland v. Washington* standard for ineffective assistance of counsel on this allegation.

Judgment of the Court

IT IS NOW ORDERED by the Court that any finding of fact in this order more properly considered as a conclusion of law shall be considered to have been restated as such. Any conclusion of law more properly considered to be a finding of fact shall be considered to have been restated as such.

IT IS FURTHER ORDERED by the Court that the Second Petition for Post-Conviction Relief filed by the

Petitioner, Thomas N. Schiro, on March 5, 1987, be denied on all grounds.

SO ORDERED this 15th day of January, 1988.

/s/ John G. Baker
JOHN G. BAKER
Special Judge
Brown Circuit Court

SUPREME COURT OF INDIANA

No. 07S00-8807-PC-656

THOMAS N. SCHIRO.

Appellant
(Defendant below),

v.

STATE OF INDIANA.

Appellee
(Plaintiff below).

Feb. 8, 1989

PIVARNIK, Justice.

This direct appeal arises from a denial of post-conviction relief. The history of this cause in this court is extensive. On September 12, 1981, Defendant Schiro was found guilty of the offense of murder while committing, and attempting to commit, the crime of rape. The trial court entered judgment of conviction on the jury's verdict. The jury recommended that the death penalty not be imposed but the trial court overruled that recommendation and ordered the death sentence for Schiro. This court affirmed the trial court's judgment. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047. On November 28, 1983, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death penalty. *Schiro v. Indiana* (1983), 464 U.S. 1003, 104 S.Ct. 510, 78

L.Ed.2d 699. On May 11, 1984, Schiro filed an amended petition for post-conviction relief which was denied by Special Judge James M. Dixon on May 29, 1984. This court affirmed the trial court's denial of post-conviction relief on June 28, 1985. *Schiro v. State* (1985), Ind., 479 N.E.2d 556. On February 24, 1986, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death sentence. *Schiro v. Indiana* (1986), 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355.

Thereafter Schiro instituted a petition for writ of habeas corpus in the United States District Court Northern District of Indiana, South Bend Division. Judge Allen Sharpe remanded to the state court, allowing Schiro to exhaust all available state remedies as required for federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254(b); *Ex Parte Hawk* (1944), 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572. Subsequently, on March 5, 1987, Schiro filed the instant action, his second post-conviction relief petition. He filed the timely motion for change of venue from the trial court and Monroe County Circuit Judge John Baker was appointed special judge, qualified and assumed jurisdiction on March 25, 1987. Schiro's petition for post-conviction relief was denied by Judge Baker.

The issues raised in Schiro's direct appeal to this court are:

1. trial court error in dismissing four allegations of error based on a finding they were *res judicata* or waived as available but not taken in direct appeal at the original post-conviction relief petition;

2. ineffective representation of counsel at trial, in the direct appeal, and in the first post-conviction relief petition;

3. the jury's guilty verdict on felony murder was a conclusive finding of lack of intent such that a possible death sentence was foreclosed; and

4. accumulated error on all above issues which amounts to prejudice warranting reversal.

The post-conviction petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. Rule PC 1 § 5. The PC 1 hearing judge is the sole judge of the evidence and the credibility of the witnesses. *Popplewell v. State* (1981), Ind., 428 N.E.2d 15, 16. A petitioner who has been denied PC 1 relief is in the position of one who has received a negative judgment; he will not obtain a reversal unless the evidence on this point is undisputed and leads inevitably to a conclusion opposite to that of the trial court. To prevail on a claim of ineffectiveness of counsel, a petitioner must satisfy both sides of a two-prong test. He must prove counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Then he must prove that such substandard performance was so prejudicial as to have deprived him of a fair trial. A fair trial is denied when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* (1984), 467 U.S. 1267, 104 S.Ct 3562, 82 L.Ed.2d 864; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

I

Schiro claims it was erroneous to dismiss four sections of his petition which alleged a) failure of the statute to provide guidelines for consideration of the jury's recommendation and for appellate review of sentences; b) error in admitting a search warrant, affidavit, and physical items; c) error in excluding a handwritten document; and d) error in providing verdict forms. The trial court found

these matters were either *res judicata* or waived as available but not taken in direct appeal or the original PCE petition.

The purpose of the post-conviction relief process is to raise issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. Where an item was available to the defendant on direct appeal but not pursued, it is waived for post-conviction review. *Sims v. State* (1988), Ind., 521 N.E.2d 336, 337. An issue which is raised and determined adverse to petitioner's position is *res judicata*. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 807. In Schiro's direct appeal this court spoke directly of guidelines for considering the jury's recommendation and for appellate review of sentences. Our discussion included the standard of review of death sentences where the court's judgment is contrary to the jury's recommendation, the degree of conclusiveness regarding a jury recommendation of leniency, double jeopardy, where both the jury and the judge consider the imposition of the death penalty where their views are in conflict, and the finding that the judge independently considers the same facts on the same standards as the jury. *Schiro*, 451 N.E.2d at 1054-1058. Questions of legality of the search warrant, affidavit, and seizure of physical items were fully discussed and disposed of on direct appeal. Schiro's contention concerning the failure of the trial court to admit as evidence a certain hand-written document was fully presented and disposed of in the opinion on direct appeal. This court noted the document was given to a witness by a third party who said Schiro wrote it. The witness did not authenticate the document through knowledge of handwriting or presence at its penning, or any other accepted basis to authenticate a piece of handwriting. The only basis he had to believe the document was the out-of-court declaration of the person who gave it to him. We upheld the trial court's finding an insufficient foundation existed to permit admission of the document.

Finally, the direct appeal opinion considered and disposed of, adverse to Schiro, his contention he was harmed by lack of some necessary verdict forms. The entire record of the trial and the original PCR petition were put into evidence in the instant cause. The trial court had the ability to read the opinion and compare issues, and the power to dismiss these issues disposed of in this court's prior proceedings. The trial court properly found all four issues were so disposed and there was no error in dismissing them as *res judicata*.

II

Schiro claims in the instant cause there were several instances of inadequate assistance of counsel at the trial level and that subsequent counsel were deficient in not raising these issues on direct appeal or original post-conviction action. The state responds Schiro was not entitled to raise these issues in a subsequent post-conviction petition and moreover, when examined, these allegations fail to show prejudice or performance below the norms of professional representation. Schiro claims there were serious matters he brought to his attorney's attention before and during trial and that trial counsel brushed them off and failed to raise them. The record shows that after all these alleged events, when asked at the end of trial if he was satisfied with his representation, Schiro responded in the positive. He then accepted the same lawyer to prosecute his appeal. He now says counsel failed to present certain issues he wanted raised on appeal. However, when the time came to present his original post-conviction petition, Schiro failed to allege even one of these trial or appellate level matters.

The court of appeals recently stated in *Alston v. State* (1988), Ind.App. ,521 N.E.2d 1331, 1335, that they would not "take a step backward and create a new vehicle by which a defendant could use a PCR to attack a previous PCR on the grounds of incompetency of counsel

in that PCR hearing, and then use yet a third PCR to attack the competency of counsel of the second PCR and so on in perpetuity." In *Lane v. State* (1988), Ind., 521 N.E.2d 947, this Court noted that ineffective assistance of trial counsel would have been an issue available in the post-conviction petition. "Lane's allegation of ineffective assistance is clearly an attempt to circumvent Rule PC 1, section 8, in order to present evidence on issues that had been waived." We stated further, "Lane cannot evade PC Rule 1, section 8, just by typing the words 'ineffective assistance of counsel.'" *Id.* 521 N.E.2d at 949.

If a petitioner is to prevail on a claim of ineffectiveness of counsel he must show he was denied a fair trial when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699; *Lawrence*, 464 N.E.2d at 1294 To meet this burden, a petitioner must overcome by strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. *Williams v. State* (1987), Ind., 508 N.E.2d 1264, 1266-67. The question is factually oriented. This court does not speculate about what may have been the most advantageous strategy. Isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. *McChristion v. State* (1987), Ind., 511 N.E.2d 297, 300.

(A)

In the second PC hearing, Schiro claims he told his counsel facts which should have been used in his defense but were not. He claimed there was evidence the victim consented to the sexual encounters and this could have been proven by checking with bartenders and clerks at bars. He further claimed Mary Lee, his girlfriend, told him she was coerced into her testimony which included his admission to, and description of, the crimes committed upon her. However, Schiro never gave the names of the

establishments he and the victim allegedly visited, or identified anyone in any of those establishments who could verify his story. Further, Mary Lee appeared as a witness attempting to help him. She recounted nothing of what Schiro told her which he had not himself told other psychiatric expert witnesses in a thirty-page confession that was referred to as an "autobiography."

Schiro claimed insanity as his defense at trial. The claims he presently makes regarding the probative value of the evidence he allegedly gave his lawyer, are totally inconsistent with the insanity defense and all other evidence in the case. Psychiatric testimony at trial showed Schiro was a manipulative and incredible individual; the trial court was therefore justified in treating his assertions as questionable and unsubstantiated. There was ample evidence justifying the trial court's deciding the credibility issue, and we find no reason to disturb it. Furthermore, even if we assume *arguendo* that Schiro did bring these matters to his counsel's attention, it was a rational strategy decision to not develop two unpromising and essentially useless leads which could be more damaging than helpful to Schiro.

(B)

Schiro also claims ineffective assistance in counsel's failure to sequester the jury. Counsel was under no duty to request sequestration in a capital case and petitioner must show prejudice by failure to move for it. *Burris v. State* (1984), Ind., 465 N.E.2d 171, 193, *cert. denied*, 469 U.S. 1132, 105 S.Ct. 816, 83 L.Ed.2d 809. To support his contention. Schiro presented a few newspaper clippings showing regional newspapers reported the trial. Included were articles about the jury's final recommendation and the judge's final sentence, though these reports obviously did not affect the jury during its deliberations. He located seven jurors but did not present any evidence that any juror ignored the judge's instructions or became exposed to any outside influence from individ-

uals or media sources. Because he failed in his burden of proof to show prejudice, we must find the trial court correctly rejected this contention of ineffective representation of counsel.

(C)

Schiro claims counsel did not present an adequate mitigation defense after the penalty phase conviction. The PCR court found Schiro failed to prove counsel's decision was unreasonable or prejudicial. The court's findings of fact noted significant mitigating evidence was presented in the guilt phase of the trial and was argued by counsel in the penalty phase. Schiro raised the insanity defense, thereby bringing into issue at the guilt phase all those matters of character, background, and history that normally are reserved for the penalty phase. It is a defensible strategic decision to use all this evidence at the guilt phase to try to obtain an acquittal and not reintroduce all the same evidence at the penalty phase. The trial court was justified in finding counsel's performance in this area did not depart from reasonable norms of representation, and therefore no prejudice was shown.

(D)

Schiro also identifies seven issues he claims were preserved for appeal but not presented by appellate counsel. This issue of ineffective appellate representation was available for presentation in the original post-conviction petition and therefore is waived in this petition. *Lane*, 521 N.E.2d at 949. Furthermore, appellate counsel need not raise on appeal an issue that in his professional judgment appears frivolous or unavailing. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 808-809. Schiro cites no evidence from the record showing unreasonable professional judgment on these seven issues. He does not give the basis on which he concludes the matters include any reversible error; he does not state the basis for the motion to dismiss or to set aside the verdict, or any of the in-

structions at issue, or the basis for objection to the evidentiary rulings.

One of the issues involved a state's rebuttal witness, Linda Summerfield, who detailed an armed sexual assault which Schiro perpetrated against her. Schiro claims counsel should have more effectively cross-examined her and objected to an array of photos from which she picked him as her assailant. First, there is no showing as to what information might have been gained by further cross-examination of this witness, and second, Summerfield's testimony did no more than repeat one instance of as many as twenty-three instances of other unrelated sexual assaults Schiro committed which he himself related in a thirty-page statement.

(E)

Schiro also cites counsel's failure to respond to his family's assertion the psychiatric witness, Dr. Osanka, tried to "shake him down" for an extra fee as a condition for the most favorable testimony. The trial judge found this story to be incredible. It rested on multiple hearsay as out-of-court declarations attributed by Schiro to his parents. The fact of this alleged "shakedown" was not shown in evidence and Schiro's parents never testified or told anyone else that this incident occurred.

(F)

Finally, Schiro claims counsel was deficient in not preventing jurors from seeing him transported in shackles. It has been held that reasonable jurors can expect a criminal defendant to be in restraints during breaks and while being transported. *Jenkins v. State* (1986), Ind., 492 N.E.2d 666, 669. We have distinguished between a prisoner appearing in court in bonds or shackles as in *Walker v. State* (1980), 274 Ind. 224, 229, 410 N.E.2d 1190, 1193-1194, and when being transported and seen incidental to that. *Sweet v. State* (1986), Ind., 498

N.E.2d 924, 929, requires a showing of actual harm where jurors see a defendant being transported in restraints. The trial court was justified in finding Schiro demonstrated no inadequacy in representation in any of these areas.

III

Schiro claims the aggravating circumstance of intentional killing could not be considered at the penalty phase because the felony murder as charged lacked the requisite element of *mens rea* in committing the underlying rape. He attempts to apply a fundamental double jeopardy rule that a conviction of lesser included offense is an acquittal of the greater offense. An aggravating circumstance, however, is not an offense. A person convicted of either type of murder, that is, intentional killing under IC 35-42-1-1(1), or felony murder IC 35-42-1-1(2), can be shown to contain the aggravator of intentional killing justifying the imposition of the death penalty. One can be found guilty of felony murder where the intention was to commit the underlying felony without necessarily intending to commit the murder. It does not follow, however, that one convicted of felony murder cannot be shown to have intentionally killed the victim while perpetrating the felony. IC 35-50-2-9 provides in pertinent part:

> (a) The State may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.
>
> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by *intentionally* killing the victim while committing or attempting to commit arson, burglary, child molesting,

criminal deviate conduct, kidnapping, rape, or robbery. (emphasis added).

The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under IC 35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to IC 35-50-2-9, and the jury determined that the aggravating circumstance existed in that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct. In this same statute, § (9)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made his. There is therefore no error presented on this issue.

IV

Schiro claims that even if individually none of the above issues raise sufficient prejudice to require relief, cumulatively they do. Since we find no error on any of the issues above, no prejudicial error is presented in their accumulation.

The trial court is affirmed.

SHEPARD, C.J., and GIVAN, J., concur.

DeBRULER, J., dissents with separate opinion in which DICKSON, J., concurs.

DeBRULER, Justice, dissenting.

In this case appellant was charged in three separate counts. Count I charged murder as a knowing killing of the victim. Count II charged murder as a killing in the course of a rape of the same victim. Count III charged murder as a killing in the course of deviate sexual conduct. The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. *Buckner v. State* (1969), 252 Ind. 379, 248 N.E.2d 348. *Smith v. State* (1951), 229 Ind. 546, 99 N.E.2d 417. *Cichos v. State* (1965), 246 Ind. 680, 208 N.E.2d 685, which appears to hold to the contrary, is not, but is a waiver case. There, this Court held that the double jeopardy claim against retrial was waived by filing a motion for new trial. Even if *Cichos* is valid law today, it does not apply here because appellant took no action between the silent jury verdict on the murder charge of knowingly killing and the judge's sentencing finding of the aggravating circumstance that appellant had intentionally killed in the course of the rape, which one might draw a waiver.

At the trial, the prosecution used every resource at its disposal to persuade the jury that appellant had a knowing state of mind when he killed his victim. It failed to do so. At the sentencing hearing before the jury it had an opportunity to persuade the jury that appellant had an intentional state of mind when he killed his victim. The jury returned a recommendation of no death. At the sentencing hearing before the judge, the prosecution had yet another opportunity to demonstrate an intentional state of mind, and finally succeeded. In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equiva-

lent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

I would reverse the judgment and remand with instructions to grant post-conviction relief in the form of a new sentence of years upon the conviction for felony murder.

DICKSON, J., concurs.

Costs of this proceeding are assessed against the Respondent.

All Justices Concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

Civ No. 583-588

THOMAS SCHIRO,

v.

RICHARD CLARK and
INDIANA ATTORNEY GENERAL

AMENDED PETITION

1. Name and location of court which entered the judgment of conviction under attack Brown County Circuit Court, Nashville, Indiana
2. Date of judgment of conviction October 2, 1981
3. Length of sentence Death
4. Nature of offense involved (all counts) Count I—Murder; Count II—Murder While Committing and Attempting to Commit Rape; Count III—Murder While Committing and Attempting to Commit Criminal Deviate Conduct; Convicted of Count II only.

* * * *

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

* * * *

GROUND XIV.

The sentence of death in this case is unreliable and suspect with a real possibility that it was imposed out of whimsy, passion or prejudice upon improper considerations and without receiving the particular and qualitative review necessary to pass constitutional muster. The death sentence as applied in this case violates the Petitioner's rights and privilege to fundamental fairness, due process, equal protection, to not be twice put in jeopardy of life, against being compelled to be a witness against himself, and to be confronted with the witnesses against him, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

* * * *

C. The sentencing authority allegedly made a finding that the Petitioner had intentionally killed when the advisory jury, clearly by inference, made a positive finding that the requisite intentionality necessary for the death sentence did not exist in this case.

* * * *

F. The Petitioner was effectively put through three (3) sentencing hearings and was placed at least twice in jeopardy of his life.

* * * *

SUPPORTING FACTS:

* * * *

C. In addition to felony murder, the Petitioner was charged with knowingly killing the victim. The jury did not find the Petitioner guilty of knowingly killing the victim. Knowingly is a lesser culpability than intentionally. Thus, the jury made a positive finding that the State did not prove beyond a reasonable doubt the Petitioner intentionally killed the victim. Such a finding is supported by the jury's unanimous recommendation

against the death penalty. The judge was precluded from then finding that the Sate did prove beyond a reasonable doubt that the Petitioner intentionally killed the victim. It should be noted that Indiana's penalty phase is more like a trial than Florida's because Indiana requires unanimity and a specific standard of proof.

D. It is clear the jury made a positive negative finding as to a knowing killing then unanimously rejected the death sentence. At no time was this considered by the trial court or the reviewing court. No consideration whatsoever was given the jury's recommendation. The only mention of it was in terms of improperly considered matters.

* * * *

F. The proceedings against the Petitioner consisted of a penalty phase before the jury on the issue of the death sentence, a sentencing hearing before the judge on the issue of the death sentence, and a proceeding before the judge on remand for additional findings of fact on the issue of the death sentence. It should be noted that the Petitioner was not present for the remand proceeding. It has been noted that Indiana's death phase is more like a trial than Florida's and the trial court's independent process to determine the necessary findings to insure the death sentence constitute double jeopardy. These proceedings further run afoul of double jeopardy by forcing the Petitioner to run the gauntlet not twice but three times. In addition the final proceeding held in the trial court ran afoul of due process.

* * * *

I. The State offered no additional evidence at the death phase of trial or at the sentencing hearing to distinguish the felony murder by proving an intentional killing after the jury had already rejected a knowing killing. Thus, the same felony was used to make the felony murder death eligible.

* * * *

(Signature of counsel and petitioner omitted in printing)

UNITED STATES DISTRICT COURT
N.D. INDIANA
SOUTH BEND DIVISION

Civ. No. S83-588

THOMAS SCHIRO,
Petitioner,

v.

RICHARD CLARK, and INDIANA ATTORNEY GENERAL,
Respondents.

Dec. 26, 1990

MEMORANDUM AND ORDER

ALLEN SHARP, Chief Judge.

On December 28, 1983, this petitioner, Thomas Schiro, filed the within petition seeking relief under 28 U.S.C. § 2254. This case has been pending since the counsel has been appointed for this petitioner. The full state court record consisting of eight (8) volumes has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Numerous proceeding have been held, the most recent one an oral argument in Lafayette, Indiana on November 8, 1990.

This petitioner, Thomas Nicholas Schiro, was convicted of murder while committing or attempting to commit rape in the Brown Circuit Court, at Nashville, Indiana, on or about September 12, 1981. Although the jury in a bifurcated death penalty proceeding did not recommend the death penalty, the Honorable Samuel R. Rosen, the Judge of the court, imposed the death penalty on this petitioner on October 2, 1981.

On direct appeal to the Supreme Court of Indiana, the aforesaid conviction was affirmed in *Schiro v. State*, 451 N.E.2d 1047 (Ind.1983), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983).

An amended petition for post-conviction relief was filed in the Brown Circuit Court on May 11, 1984, and was heard by the Honorable James M. Dixon acting as special Judge. Judge Dixon denied that petition for post-conviction relief after a hearing on May 29, 1984, and the Supreme Court of Indiana affirmed the denial of post-conviction relief as reported in *Schiro v. State*, 479 N.E.2d 556 (Ind.1985), *cert. denied*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986) (Brennan and Marshall, J., dissenting).

When the second appeal got to the Supreme Court of Indiana in *Schiro v. State*, 479 N.E.2d 556 (1985), Justice Prentice concurred in the denial of post-conviction relief and in the opinion authored by Chief Justice Givan thereon. Only Justice DeBruler dissented, citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, (1950), and *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). A further petition for post-conviction relief was filed in the state court. Special Judge John Baker of Bloomington, Indiana, now a judge on the Court of Appeals of Indiana, heard that petition and denied same which was appealed to the Supreme Court of Indiana, which affirmed the decision of Judge Baker in *Schiro v. State*, 533 N.E.2d 1201 (Ind.1991), *cert. denied*, —— U.S. ——, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). In that appeal, the Supreme Court, speaking through Justice Pivarnik, denied claims of ineffective

assistance of counsel made under the Indiana Post-Conviction Remedy Rule, and Justice DeBruler again dissented, primarily on the ground that the recommendation of the jury was an acquittal, triggering the protections of the double jeopardy clause. In this effort, he picked up the concurring vote of Justice Dickson.

Numerous proceedings have been held in this case, including a final oral argument in Lafayette, Indiana, on November 8, 1990, and this petitioner has had the benefit of able and experienced appointed counsel throughout these proceedings. An amended petition seeking relief under 28 U.S.C. § 2254 was filed here August 19, 1986, and that petition and the return addressing it form the issues to be decided by this court.

It is basic and elementary that this court is here engaged in collateral review which must focus only on constitutional issues properly raised and exhausted. *See Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). There is nothing conceptual with reference to cases in which the death penalty is imposed that changes the basic scope of this court's collateral constitutional review under § 2254. As a matter of reality, it is to be noted that a good number of steps have been taken by the Court of Appeals in this circuit to insure that this variety of federal habeas review is done in a most careful fashion. In this vein, this court has made a full independent review of all of the state record under *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

It is also basic that this court does not act as a general court of common law review, but acts under a specific federal statute that limits its consideration to errors properly preserved and exhausted that are of a constitutional dimension. The Supreme Court of Indiana, in the direct appeal of this case in *Schiro v. State*, 451 N.E.2d 1047, the basic facts are stated as follows:

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on the nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist confirmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m. on February 5, 1981, the day Laura Luebbehusen's body was found. Shiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay." This story Schiro made up in

order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had bet him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro said Luebbehusen talked about homosexualty and Luebbehusen told Schiro that she, too, was "gay." Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Laura Luebbehusen try to insert one into his anus. He found the experience too painful and told Leubbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to go buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

Schiro, 451 N.E.2d at 1049-1050.

An issue was raised with regard to the so-called proportionality. The validity of any such issue in this case appears to have been laid aside by the Supreme Court of the United States in *Pulley v. Harris*, 465 U.S. 37, 104

S.Ct. 871, 79 L.Ed.2d 29 (1984), and reaffirmed in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The issue also appears to have emerged in regard to the double jeopardy clause of the Fifth Amendment of the Constitution for the United States, as made applicable to the states under the Fourteenth Amendment. The complaint seems to be that somehow the double jeopardy clause of the Fifth Amendment was violated. For a discussion of that clause recently by this court, *see United States v. Crumpler*, 636 F.Supp. 396 (N.D.Ind.1986). *See also Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). This argument seems to spring from the action of the Supreme Court of Indiana when by order of February 11, 1983, it remanded to the Brown Circuit Court for a written entry reflecting the reasons for this death sentence. Somehow it is contended that this action violates the Double Jeopardy Clause. Even more far-fetched is the argument that somehow this petitioner had the right to be present when the Brown Circuit Court entered its written findings on that remand. He had no more right to be present then than he had a right to be present when the justices of the Supreme Court conferred on his case.

In any event, it appears that *United States v. Cosentino*, 869 F.2d 301, 309 (7th Cir.1989), has answered that double jeopardy question adverse to this petitioner. Where a new entry was made on the basis of evidence already in the record, there is neither a constitutional right to be present when that formal entry is made by the state trial judge nor is the double jeopardy clause violated, the practice of appellate courts in remanding cases for more explicit findings is commonplace in both criminal and civil appeals. The Supreme Court of the United States has upheld a death sentence entered pursuant to a remand even when there is a deficiency in the first sentence. *See Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). It does not appear in

this case that this remand was because of insufficient evidence, but it was designed to give the Supreme Court of Indiana a more explicit statement of the reasons for this death sentence. Such is altogether proper action by the Supreme Court of Indiana. *See Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1989). The Supreme Court has also dealt with the double jeopardy concept where there is a new sentencing hearing in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Certainly, if a new hearing can be constitutionally held, the Supreme Court of Indiana is well within its authority to request a more explicit written finding from the sentencing trial judge on the basis of the evidence already presented. Certainly, the double jeopardy clause of the Fifth Amendment of the Constitution of the United States does not inhibit that process. Neither is the confrontation clause of the Sixth Amendment of the Constitution of the United States violated in such a situation. *See Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

A far more fundamental concern is the simple fact that the jury recommended against the death penalty and Judge Rosen chose to impose one. The Indiana statute permits that to happen and that statute on its face passes constitutional muster. In this regard, it is necessary to here set out the statement of Judge Rosen:

> PRONOUNCEMENT OF SENTENCE
>
> The Defendant, having been found guilty by a jury on the 12th day of September, 1981, and the Court having entered judgment of conviction of the crime Murder/Rape, and on September 15, 1981, the Court having heard arguments by Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana, and Michael Keating, for the Defendant, and both the State and counsel for Defendant having

moved to incorporate the evidence of the trial, which motion was granted by the Court, and the jury having returned their unanimous recommendation to the Court that the death penalty not be imposed on the Defendant, and the Court having reviewed the evidence of the trial thereafter, and having considered the written presentence report, gives the following reasons for the imposition of the sentence: The jury in its verdict of guilty of Murder Rape, rejected the plea of insanity. The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard R. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community. David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense. The Defendant's own witness, a psychologist, Dr. Frank Osanka, indicated that the Defendant is 'overpowered by the need for erotic release.' Mary T. Lee, with whom the Defendant had lived, testified to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T.

Lee also testified that he had knocked out her front teeth with his fist. Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant and Defendant's counsel had no questions and made no objections to her testimony. At no time has the Defendant indicated any remorse. These are aggrevating circumstances.

The fact that the Defendant committed these crimes with gruesome, sadistic acts, including necrophilia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught. This is an aggravating circumstance.

The Defendant had been previously convicted of robbery, a class C felony, in Vanderburgh County, and was on work release when arrested for this crime. This is an aggravating circumstance.

This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced the jury in its recommendation.

The age of the Defendant is twenty years. This is not a mitigating circumstance, nor was the age of the victim, twenty-eight years, a mitigating circumstance.

> For all of the above reasons, the Court now sentences the Defendant to death. The sentence is required by the Statutes of the State of Indiana, as all of the aggravating circumstances listed herein by far outweigh any mitigating circumstances.
>
> The Court has no choice but to follow the law.
>
> The Defendant is to be executed as by law provided on the 28th day of January, 1982, before sunrise.
>
> The Defendant is remanded to the custody of the Sheriff.

The petitioner through his counsel has been given the rare opportunity to have some sworn testimony by the sentencing judge which was elicited in post-conviction proceedings in the state court. One would hope that does not become a regular tactic. A sentencing judge who imposes a death sentence has enough to worry about and should not be put on trial after the fact. It does not appear to this court to be necessary that a sentencing judge himself be put on trial and under oath before yet another judge to explain any sentence, including the death penalty. That is in the opinion of this Judge, not a very good way to properly manage the relationship between a trial judge and litigants and a trial judge and a reviewing appellate court. The procedure really creates many more problems than it solves, and such is the case here.

On the sentencing process, a presentence report was made available to this petitioner and his counsel which contained a mass of information, including an admission by the petitioner that he tried to manipulate people. An opportunity was provided to the petitioner and his counsel to comment on or object to the contents of that presentencing report. In fact, such a pleading was filed with reference to statements of a Dr. Crane. There is certainly evidence of the manipulative aspect of this petitioner's personality before the sentencing trial court.

A double jeopardy argument is made with reference to the recommendation of the jury vis-a-vis the sentence of the trial judge. It is argued that the first judgment of the jury should preclude or bar a second judgment of the trial judge. However, the Indiana death penalty statute in Indiana Code § 35-50-2-9 places the sentencing function on the trial judge. A copy of the death penalty statute is marked Appendix "A" and attached hereto. The Supreme Court of the United States has specifically found that there is no constitutional requirement for so-called jury sentencing. *See Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Supreme Court of Indiana made the same decision in the first direct appeal at 451 N.E.2d at 1055. The so-called verdict of the jury in both Florida and Indiana are advisory. The same is also true in Alabama and the Supreme Court of the United States dealt with that statute in *Baldwin v. Alabama*, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). In *Baldwin*, 472 U.S. at 372, 105 S.Ct. at 2728, the complaint was that the sentencing judge gave too much consideration to the jury's recommendation. However, the Supreme Court of the United States directly answered the constitutional question here posed in *Spaziano*, 468 U.S. at 447, 104 S.Ct. at 3155. Paralleling that conclusion, the Supreme Court of Indiana was constitutionally correct in its ruling on the direct appeal in 1983.

In his concurring and dissenting opinion at 451 N.E.2d at 1064, Justice DeBruler details the argument that the recommendation of the jury against the imposition of the death penalty is in fact a "verdict" that invokes the double jeopardy clause of the Fifth Amendment of the Constitution of the United States as the same is incorporated into the Fourteenth Amendment. The argument is comprehensively and well-stated but most respectfully, that argument has been categorically rejected by a majority in the Supreme Court of Indiana. In his concurring

and dissenting opinion, Justice Prentice parallels the argument made by Justice DeBruler and adds a number of points that find their foundation primarily in state law.

The mandate in Indiana appears to be that a sentencing trial judge in imposing the death penalty must find by clear and convincing evidence reasons for declining to follow the jury's recommendation. *See Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). An argument is made along the way that Judge Rosen considered the Indiana statute to mandate rather than allow the death penalty. That is not a correct reading of the Indiana statutes and there is nothing in this record to indicate that Judge Rosen finally had that understanding of the statute. Judge Rosen obviously felt very strongly that based on the record and the case which he had seen and heard, the death penalty *should* be imposed.

In the trial itself on the merits, there is a claim that the state trial judge erred constitutionally in the admission of incriminatory statements made by the director of the work release program in which Schiro was serving a sentence at the time of the murder. It is contended that the admissions thereof were in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Those statements were not in violation of *Miranda*, 384 U.S. at 436, 86 S.Ct. at 1602. As a matter of fact, the Supreme Court has gone considerably farther than the state trial judge did here. In *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), the petitioner was questioned by a probation officer and confessed to a crime and that testimony was not prohibited by *Miranda*. In this case, the petitioner voluntarily sought to talk to someone, that person being one Kenneth Hood. The petitioner initiated the conversation and that finding of fact was made explicitly by the Supreme Court of Indiana in 451 N.E.2d at 1061. Such finding of fact is presumed to be correct under 28 U.S.C. § 2254(d), but this court has made an independent examination of

the record in that regard under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, and is in complete agreement with the aforesaid finding by the Supreme Court of Indiana in this regard.

In this case, that officer was merely listening to a voluntary statement initiated by the petitioner and *Miranda* was not violated. This is not an example of state-sponsored interrogation. In this instance, the voluntariness of the statement was clearly established under the mandates of *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

An attack is made upon the verdict forms that were submitted. The jury was given a one-page form containing three paragraphs of possible verdicts and a blank space for the date and foreperson's signature under each paragraph. The jury considered the following language:

> We, the jury, find the defendant not guilty.
>
> We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information.
>
> We, the Jury, find the defendant guilty while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct as charged in Count III of the information.

It is extremely doubtful that this rises to the level of a constitutional challenge. The jury was told that there could be a finding of guilty but mentally ill and that that applied to all three theories of murder. The instructions and verdict forms must be examined as a whole to determine whether they pass constitutional muster. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). It is important to note that this issue was not raised prior to the retirement of the jury.

An effort is made to challenge the original charging information in a state court as being unverified. A facial

examination clearly shows that it was indeed verified. The initial information dated and filed February 10, 1980, has been examined here. On April 9, 1981, there were requests for the death penalty filed by the Chief Deputy Prosecutor of Vanderburgh County, Indiana. That issue was never raised in the state courts and has been raised here for the first time. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *rehr'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989). Justice O'Connor stated:

> A rule announced in *Harris v. Reed* [489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)], assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one where the claim was *never* presented to the state courts. (emphasis added) 489 U.S. at 299 [109 S.Ct. at 1068-69]

It does not appear that the other concurring judges in *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060 are at odds with the above quoted statement of Justice O'Connor. Their focus was primarily on the problem of retroactivity of the rule established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, it seems clear that when *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060, and *Harris*, 489 U.S. 255, 109 S.Ct. 1038, are considered in tandem issues that were never raised in the state courts are the proper subject of procedural default in this collateral review under § 2254. Were it to be otherwise, there could never be an end to this kind of collateral review. If a defendant convicted in a state court proceeding could file continuous assertions of issues and claims not previously raised in the state courts, and then claim the benefits of *Harris*, it would be very difficult if not impossible, to ever bring a § 2254 proceeding to an end. *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) might provide a cutoff

in such cases. *See also Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Certainly, this is a subject that has caught the attention of a special committee chaired by retired Justice Lewis F. Powell and a legislative solution to this kind of problem which pending in the Congress of the United States. However, under *existing* law, it appears that issues have not been raised in the state courts can and should be procedurally defaulted under the above analysis of *Harris v. Reed*, and *Teague v. Lane*.

Another effort is made to challenge whether *mens rea* was alleged in the charging information or is required by the relevant Indiana statute. Such issue does not appear to have been raised in any way in the state courts and under the above reasoning in *Harris* and *Teague*, cannot be presented here for the first time. It is subject to procedural default. There can be no question, however, that *mens rea* was an element of the crimes charged and that there was more than enough proof of its existence in the record in this case. Whatever conceptual merit this argument might have, it does not rise to a constitutional level in this case. *See Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.E.2d 127 (1987).

There is a charge that there is some variety of a due process violation, possibly a double jeopardy one, in that three Counts of murder with three allegedly different theories were charged when there was only one killing and one victim. This issue was never raised in the state courts and is raised for the first time here and is subject to procedural default under the above analysis of *Harris v. Reed* and *Teague v. Lane*. In any event, there was a finding of guilty *only* on Count II.

An issue under the Fourth Amendment with reference to a search warrant is raised. It is alleged that the affidavit to obtain the warrant, the return of the warrant and the items seized under the warrant were improperly allowed into evidence. It is alleged that the person who

issued the warrant was not a neutral and detached magistrate. It is further alleged that in part, the warrant was based on information provided by Kenneth Hood, above referred to, which was obtained in violation of the *Miranda* rule. Since there was no *Miranda* violation in that regard, that part of the argument here fails.

It appears that the Fourth Amendment issue in this regard was fully and fairly litigated in the state courts under the mandates of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Once that decision is made, it is not to be litigated here. *See also Willard v. Pearson*, 823 F.2d 1141 (7th Cir.1987); *Wallace v. Duckworth*, 778 F.2d 1215 (7th Cir.1985).

On the first direct appeal, this issue is dealt with at 451 N.E.2d at 1061. Even aside from *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, the decisions of the Supreme Court of the United States in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) would authorize the issuance of a search warrant. Although it is doubtful if it is necessary to go to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), for salvation in this regard, certainly it also would provide a constitutional basis for the admission of the fruits of this search warrant.

There is some argument made that this issue was not fully and fairly presented to the state courts in the first instance under *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989), and *Cruz v. Warden of Dwight Correctional Center*, 907 F.2d 665 (7th Cir.1990). The court chooses not to bottom its decision in this regard on that concept, but rather bottoms it on the *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, concept.

The next issue raised has to do with refusal of the state trial court to admit a letter allegedly written by the petitioner, but not admitted into evidence because of the failure to have the letter properly authenticated. This issue

was presented to the Supreme Court of Indiana on direct appeal and resolved there at 451 N.Ed.2d at 1061 and 1062. It is highly doubtful if it raises a constitutional issue. At most it presents an issue of the state law of evidence which should not be interfered with by the federal judiciary on collateral review. It cannot be shown that its exclusion undermines the basic and fundamental fairness of these proceedings.

Another issue is raised here for the first time regarding the modification of a certain instruction tendered by the petitioner. Again, this issue is foreclosed by the aforesaid reasoning in *Harris*, and *Teague*. In this regard, the defendant/petitioner tendered his instruction 15 which stated:

> The Defendant, Thomas Schiro, has not taken the witness stand as a witness. His failure to do so shall not, in any manner, be considered by you in arriving at your verdict, nor should you consider his appearance and demeanor in the courtroom during trial in arriving at your verdict.

In giving this instruction, the trial court struck therefrom "nor should you consider his appearance and demeanor in the courtroom during trial in arriving at your verdict." No authority is cited by this petitioner to demonstrate any errors here. Any error is not of the constitutional variety.

At trial, the state presented a rebuttal witness in the testimony of Linda Summerfield, sometimes called Linda Summerford. She allegedly was raped by the petitioner and recognized his picture as her attacker in the newspapers. A photographic lineup was conducted and she picked out Schiro's picture in that display. There is a question here as to the Fourteenth Amendment duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *See also United States v. Jack-*

son, 780 F.2d 1305 (7th Cir.1986); *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir.1985); *United States v. Fairman*, 769 F.2d 386 (7th Cir.1985); and *Carey v. Duckworth*, 738 F.2d 875 (7th Cir.1983). However, it does not appear to this court that this evidence is *ex* culpatory. In fact, it was very much *in* culpatory. It should be noted that this is not a case in which the alibi defense was imposed as was the case in *Mauricio v. Duckworth*, 840 F.2d 454 (7th Cir.1987) *cert. denied*, 488 U.S. 869, 109 S.Ct. 177, 102 L.Ed.2d 146 (1988). Neither is the concept of reciprocal discovery in the alibi context of *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) applicable. Any earlier nondisclosure of the existence of the testimony of Linda Summerfield (Summerford) violated none of the due process rights of this petitioner. This court chooses not to bottom its decision in this regard on procedural default, since there was some reference to it in the state record. The petitioner apparently in an effort to have the jury conclude that he was mentally deranged, admitted to 23 sexual attacks of which the incident with Linda Summerfield (Summerford) was only one. In any event, the due process clause was not violated. Even assuming the existence of some error in failing to disclose this rebuttal witness, the same is harmless beyond a reasonable doubt.

Constitutional errors in a criminal trial are grounds for reversal unless they are "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The petitioner is entitled to a fair trial not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). *See also Sulie v. Duckworth*, 864 F.2d 1348, 1356 (7th Cir.1988); *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir.1988), *cert. denied*, 488 U.S. 841, 109 S.Ct. 110, 102 L.Ed.2d 85 (1988). The harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436. *See also United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017 (7th Cir.1988).

The intial inquiry for the court then "is whether absent the constitutionally-forbidden evidence, honest and fair-minded jurors might very well have brought in not-guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir. 1986) (citing *Chapman v. California*, 386 U.S. 18, 26, 87 S.Ct. 824, 829, 17 L.Ed.2d 705 (1967)). The court must determine " 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *United States ex rel. Ross v. Fike*, 534 F.2d 731, 734 (7th Cir.1976) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). This circuit generally requires other evidence of guilt to be "overwhelming" before concluding a constitutional error was harmless. *See Sulie*, 864 F.2d at 1359; *Smith v. Fairman*, 862 F.2d 630, 639 (7th Cir.1988), *cert. denied*, 490 U.S. 1008, 109 S.Ct. 1645, 104 L.Ed.2d 160 (1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir.1987); *Burns*, 798 F.2d at 943; *United States v. Shue*, 766 F.2d 1122, 1133 (7th Cir.1985). But in making this determination the court is not to engage in a reweighing of the evidence to determine the impact on the jury's verdict. *Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir.1988). Rather, the court must examine all the evidence to determine the impact of the objectionable evidence on the jury's verdict. *Id. See also United States v. de Ortiz*, 883 F.2d 515 (7th Cir.1989); and *United States v. Check*, 882 F.2d 1263 (7th Cir.1989).

There is also a constitutional issue raised with regard to the sequestration of the jury and the admonitions with reference to media accounts. It should be remembered that this case was tried in Nashville, Indiana, in one of

the smallest and least populated counties in the State of Indiana, a town with a weekly newspaper and no local radio or television station. The record in this case in regard to any possible prejudicial publicity is light years away from *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), and *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This issue was raised primarily under the guise of ineffective assistance of counsel and was dealt with in the third opinion by the Supreme Court of Indiana at 533 N.E.2d 1201 et seq. It must be examined under the mandates of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *United States v. Grizales,* 859 F.2d 442, 447 (7th Cir.1988), Judge Eschbach, speaking for the court stated:

> The Supreme Court has instructed that in evaluating the performance of a trial attorney we are to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2054. Appellant "has a heavy burden in proving a claim of ineffectiveness of counsel." *Jarrett v. United States,* 822 F.2d 1438, 1441 (7th Cir.1987) (citing *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064). The Supreme Court has further cautioned appellate courts to resist the temptation to "second-guess" the actions of trial counsel after conviction. *Id.* It is clear that the performance of trial counsel should not be deemed constitutionally deficient merely because of a tactical decision made at trial that in hindsight appears not to have been the wisest choice. *See Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *United States v. Kennedy,* 797 F.2d 540, 543 (7th Cir.1986).

See also United States v. Adamo, 882 F.2d 1218 (7th Cir.1989). There is no showing that any juror was exposed to media coverage during trial. The Supreme Court

of Indiana expressly made that finding at 533 N.E.2d at 1206. That finding, while presumptively correct, is also supported on the basis of an independent examination of the record under *Miller v. Fenton,* 474 U.S. at 104, 106 S.Ct. at 446. *See Rushen v. Spain,* 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984).

The burdens on a trial judge in a death penalty case are enormous. The appellate courts and the federal reviewing courts should not engage in second-guessing about how to best manage this awfully difficult judicial event. Each locale and each case has its own life and set of circumstances. There is nothing in this record to indicate that Judge Samuel Rosen violated the Constitution of the United States in his management, including lack of sequestration of this jury, during this trial. Most seasoned trial judges avoid sequestration of juries like the plague. Such is fraught with both personal and judicial problems. It is only when the factual record demonstrates that nothing short of sequestration will suffice should a reviewing court find a constitutional error. No basis to compel sequestration is to be found in this record.

An issue is raised with reference to the claim that the state trial court failed to give this indigent petitioner expert psychiatric assistance. Even assuming that this somehow raises a constitutional right, this petitioner did have psychiatric assistance in the preparation of his defense in the person of Dr. Frank Osanka. The testimony challenging the credibility of Dr. Osanka was that of the petitioner himself. That testimony was specifically found to be incredible by the state trial judge who heard him. *See Schiro,* 533 N.E.2d at 1207. Assuming the best of this for this petitioner, his constitutional rights were not violated in that regard. There were two independent court-appointed psychiatrists who evaluated this petitioner as to both his competency to stand trial and his sanity at the time of the trial. Those psychiatrists did not conclude that the petitioner was insane but certainly the Constitution of the United States does not guarantee to

a defendant charged with a serious death penalty crime the right to have a psychiatrist who will claim that he is insane. The mere statement of that proposition indicates its utter absurdity.

It should also be noted that the appointment of two independent court-appointed psychiatrists meets the constitutional demands of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

Much is made of the so-called rocking/non-rocking situation. That brief factual slice of the record probably has gotten considerably more attention than it deserves. Manipulation is not a basis in Indiana for imposing a sentence of death and was not used and the Supreme Court of Indiana specifically found that it was not used in this case. *See* 479 N.E.2d at page 559. The Supreme Court of the United States has said in a general way that a sentence may be enhanced if the sentencing trial judge believes that the defendant's testimony was perjured. *See United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). However, when a sentencing judge does enhance a sentence for that reason, a defendant is not generally entitled to a hearing on that issue. *See United States v. Bortnorsky*, 879 F.2d 30, 43 (2nd Cir.1989).

There is a right to have a sentence based on reliable and accurate information. *See Tucker v. United States*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). *See also United States v. Harris*, 558 F.2d 366 (7th Cir.1977).

One of the issues raised post-conviction and here is that Judge Samuel Rosen exhibited bias and prejudice against this particular petitioner because of an alleged ex parte and post-trial statement that "the boy is going to fry." Certainly, there is a longstanding right to an impartial judge, as defined by Chief Justice Taft more than 60 years ago in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In this regard, that court stated:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. *Wheeling v. Black*, 25 W.Va. 266, 270. But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in this case.

No such problem exists in this case. What is involved here is reactions of this state trial judge after the fact rather than before the fact. Criminal trials that are envisioned under the Sixth Amendment of the Constitution of the United States are enormously human events. Judges who preside over such criminal trials which involve the grossest kind of violence that is rested by one human being on another are not required to put their potential for moral indignation on the back shelf. When a defendant is charged with a serious crime, regardless of how grotesque the charge may be and how heinous the conduct of that defendant may be, it is the sworn task of a presiding trial judge to comply as evenhandedly as possible with the mandates of the due process clause in following the law and the basic concepts of fairness that inhere. It would certainly be a sad day for either the state or federal judiciary if judges were required to be or become valueless and morally neutral. It would also be a sad day for the state and federal judiciary if a veteran trial judge somehow through the process of experience became immune to normal feelings of moral indignation at heinous and violent criminal conduct.

The record in this case most certainly justified these private feelings of moral indignation by this veteran state court judge. However, Judge Rosen erred, although not

in a constitutional sense. In a case tried by this Judge, *United States v. Murzyn*, 631 F.2d 525 (7th Cir.1980), an issue was raised with regard to a comment that this Judge made in the course of that trial. Chief Judge Bauer (then Judge) of the United States Court of Appeals suggested at page 535 that the comment would have been better left unsaid. Nonetheless, the verdict of guilty in *Murzyn* was upheld on appeal, and that bit of judicial conduct did not create a constitutional defect.

Understanding the cultural environment that pervades places like Nashville, Indiana, apparently Judge Rosen made a gratuitous ex parte out-of-court comment to a newspaper reporter and the deputy prosecuting attorney. The post-conviction state judge heard testimony from Judge Rosen, the newspaper reporter and the deputy prosecuting attorney in regard to this incident. Based on that testimony, that post-conviction relief state judge made a specific finding of fact that there was no bias or prejudice by Judge Rosen. That decision was upheld by the Supreme Court of Indiana. However, this does not excuse the fact that state trial judges who preside over cases in which the death penalty is or may be imposed have enormously delicate responsibilities. Speaking ex parte after the fact to a newspaper reporter or a deputy prosecutor does not serve that proper judicial function. This court has examined this slice of the record with the greatest of care and delicacy and is convinced that there is very substantial support for the conclusion of the state courts in this regard and is convinced that there was no violation of the constitutional right as defined in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437. The facts in *Tumey* are a far cry from those here.

The petitioner was found guilty of the charge in Count II. Somehow it is now attempted to extrapolate the fact that there was no finding of guilty under Count I of the information into a finding that there was no intentional killing and therefore the death penalty is not appropriate. In order to get to that result, a number of large jumps in logic and fact are necessary. The facts are that the

petitioner was found guilty in Count II. The jury did not fill out a verdict form on Counts I or Count III. Somehow this becomes a double jeopardy claim. This petitioner was not acquitted by Counts I or III and neither was he found guilty. He was found guilty on Count II.

It is a constitutional condition precedent to an application of the double jeopardy clause of the Fifth Amendment of the Constitution that there be an acquittal. Whether there is an acquittal depends largely on state law. *See Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). *See also United States ex rel. Young v. Lane*, 768 F.2d 834 (7th Cir.1985), *cert. denied*, 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300 (1985). The Supreme Court of Indiana in the first direct appeal stated that the jury's recommendation was "an intermediate step" in the process toward the court's final judgment. *See* 451 N.E.2d at page 1056. There is an analogy, although not a perfect one, between this situation and inconsistent verdicts. *See United States v. Reed*, 875 F.2d 107 (7th Cir.1989). There is simply no constitutional merit to the argument that somehow the failure of the jurors to render any decision on Counts I and III some way or other constitutes an acquittal which extrapolates into a double jeopardy argument that frees this defendant petitioner.

When it is all said and done, the judge of the Brown Circuit Court engaged in a fully constitutionally adequate sentencing procedure that has been fully and carefully explained on the record and in writing. It does not suffer from any constitutional deficiencies which causes this court to set it aside on collateral review. This case has now been to the Supreme Court of Indiana three times. While there are justices on that court who have expressed concerns, the majority of that court in each instance has declined to undermine this sentence of death. That court's recent history indicates that it is perfectly capa-

ble of reversing a death sentence. *See Smith v. Indiana*, 547 N.E.2d 817 (Ind.1989); *Cooper v. Indiana*, 540 N.E.2d 1216 (Ind.1989); and *Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). It is also very clear that Justices of the present Supreme Court of Indiana are more than capable of rendering individualized judgment in criminal death penalty cases. The record here is evidence of that kind of review. The Supreme Court of the United States has denied certiorari in this case three times. This court would especially note the statement of Justice Stevens in *Schiro v. State*, —— U.S. ——, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). With the greatest respect for Justice John Paul Stevens, it is the fervent hope of this court that the issues about which he expressed concern have been dealt with here in the fashion that he suggested.

An issue is raised with regard to the effective assistance of counsel under *Strickland*, 466 U.S. at 668, 104 S.Ct. at 2054, which requires both unprofessional conduct and actual prejudice. *See United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1013-14 (7th Cir. 1987). That issue was thoroughly examined in the third opinion of the Supreme Court of Indiana at 533 N.E.2d at 1207. While this court cannot rely on the correctness of the legal judgment in that regard, it can presume as correct the historical facts under 28 U.S.C. § 2254(d). However, under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, this court has made an independent examination of the record in this regard and finds the various attempts to nitpick after the fact the conduct of defense counsel to be little more than that. This defense counsel was confronted with a most difficult situation and did a job which met Sixth Amendment professional standards.

There is a charge that this defense counsel failed to submit mitigating evidence during a sentencing hearing, relying on *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir.

1985), *cert. denied*, 471 U.S. 1108, 105 S.Ct. 2344, 85 L.Ed.2d 859 (1985). In *Dillon*, there was no insanity defense and the assertion of such a defense opens a very wide door with regard to the character and history of a defendant. During the guilt phase of the trial, the personal history of the defendant was brought forward, including testimony by his father. Defense counsel argued the mitigating factors to the jury and to the judge at sentencing. A defendant has a right to effective assistance of counsel at sentencing. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). However, strategic decisions are accorded substantial deference. *See Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). There is a presumption that effective assistance of counsel is rendered until the contrary is shown and the burden is on the petitioner to do so. *See Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir.1989). Certainly, a defense counsel is not required to present mitigating evidence when none exists. *See Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir.1988). *United States v. Myers*, 917 F.2d 1008 (7th Cir.1990). It is further alleged that somehow the prosecution coerced Mary Lee into testifying and there was a failure to disclose so-called exculpatory evidence in this regard. This was raised as a claim of ineffective assistance of counsel in the state courts where it was claimed that the petitioner told his counsel that the state had threatened to take away Lee's child if she did not cooperate, but that the attorney did nothing about it. This claim appears to be at odds with the one made in the state court. Either the petitioner and his counsel knew about Mary Lee and it was therefore undisclosed, or they did not know and it should have been disclosed. Apparently, they can't have it both ways. In any event, there was no prejudice to the petitioner by the testimony of Mary Lee, some of which was indeed favorable to him. Testimony was also cumulative with reference to the testimony of

the court-appointed psychiatrist. Certainly, her testimony did not change the outcome in this trial in favor of the petitioner. The record in this case, however, fails to disclose any coercion. In fact, the Supreme Court of Indiana found to the contrary at 533 N.E.2d page 1206. While that historical fact is presumptively correct under Title 28 U.S.C. § 2254(d), an independent examination of the record under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446 discloses that it is correct in any event.

Last of all, there is an attempt to make an issue with regard to the handcuffing and shackling of the petitioner outside the courtroom during breaks in court proceedings and going to and from the courthouse. There is no evidence in the record that any juror saw the petitioner in that condition. In another case, *Osborne v. Duckworth*, 567 F.Supp. 427 (N.D.Ind.1983), this court was very concerned about an incident in the Adams County Courthouse in Decatur, Indiana, and granted a habeas corpus petition under 28 U.S.C. § 2254 because of it. That decision was reversed in an unpublished opinion by the Court of Appeals. *See* 757 F.2d 1292 (7th Cir.1985).

Finally, the prosecuting authorities have a substantial interest in seeing that a defendant on trial for a capital case remains in custody and does not escape from a small, rural courthouse and the adjacent jail. *See Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed. 2d 525 (1986). *See also Clark v. Wood*, 823 F.2d 1241, 1245 (8th Cir.1987), *cert. denied*, 484 U.S. 945, 108 S.Ct. 334, 98 L.Ed.2d 361 (1987).

It should be noted that counsel's memorandum filed on September 4, 1990, on behalf of the petitioner deals exclusively with the question of intentionality. Although of some constitutional dimension, counsel's memorandum contains more of a question of complying in rather straightforward criminal law terms with the requirements of the Indiana death penalty statute. Petitioner asserts that Judge Rosen did not make a specific finding of fact of an intentional killing. The Supreme Court of Indiana

ruled in *Fleenor v. State*, 514 N.E.2d 80 (Ind.1987), that Indiana's death penalty statute survives a constitutional challenge because it requires a finding of specific intent.

The first time the Supreme Court of Indiana reviewed the petitioner's case on direct appeal, it found that, "with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen." *Schiro v. State*, 451 N.E.2d 1047, 1059 (Ind.1983). This issue was held to be *res judicata* on petitioner's third post-conviction review. *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989).

This court agrees with the Supreme Court of Indiana's determination that Indiana's death penalty statute is constitutional and that Judge Rosen complied with it in sentencing Thomas Schiro.

I.C. § 35-50-2-9 states:

> a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.
>
> b) The aggravating circumstances are as follows:
>
> > 1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

It is apparent that Justice Stevens and Justice DeBruler are judicially squeamish about the procedure under Indiana law, whereby a sentencing trial judge may impose

a death sentence even after a jury has made a contrary recommendation. As a matter of federalism, the General Assembly of the State of Indiana has the option to enact such a procedure which on its face does not violate the due process clause of the Fourteenth Amendment, the Sixth Amendment, or the Eighth Amendment of the Constitution of the United States. Given the basics of federalism, this court should not disturb that state established procedure. *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

With that procedural process established, the factual record must clearly support the imposition of the death penalty. The sentencing trial judge should not ignore the recommendation of the jury. However, that sentencing authority is fixed in that judge and not in the jury. The realities of the situation are that the sentencing judge faces a more rigorous standard in imposing the death penalty in the face of a contrary jury recommendation. The factual record must clearly justify the death sentence and the reasons given by the sentencing judge must be appropriate ones. The primary focus must be on the factual record as the foundation for the reasons stated. The values involved are far too important to become immersed in minor formalities. The Supreme Court of Indiana simply wanted from the sentencing trial judge a more complete statement of reasons for the imposition of the death penalty and it got same. Such procedure did not invoke the double jeopardy clause of the Fifth Amendment of the Constitution of the United States.

The reasons given for the imposition of the death penalty by the sentencing trial judge, both orally and in writing, have been fully set forth here. Those reasons spring from the factual record, are clearly reflected therein, and meet the constitutional standards currently applied by the Supreme Court of the United States in comparable cases.

It is a part of the *state* law of this case that the non-action of the jury on Counts I and III does not constitute

an acquital. It is not here necessary to write a constitutional treatise on the double jeopardy clause based on a hypothetical that some effort is being made to again try this petitioner on Counts I and III because that situation does not confront this court. In the reality of criminal prosecutions, it is commonplace for multiple and indeed alternative criminal charges to be submitted to a jury and for the jury to return a verdict on less than all of the charges submitted. It is not necessary for this court to determine whether there is perfect symmetry in the case law of Indiana in this subject area. In *this* case, *this* jury found *this* petitioner guilty of Count II and did not act on Counts I and III. The death penalty was imposed on Count II. There is nothing in the Fourteenth or Fifth Amendment of the Constitution of the United States that *compels* this court to label that non-action on Counts I and III as an acquittal for Fifth Amendment double jeopardy purposes. The Supreme Court of Indiana, with Justice DeBruler dissenting, did not so label it and a decent respect for the basic concepts of federalism does not compel this court to do otherwise.

Justice Stevens quotes Justice Powell, now retired, in stating that special and careful attention is required in regard to the consideration of death penalty cases. This court is in total agreement. No one can argue with those suggestions. The record in this case certainly reflects nearly a decade of state and federal court actions and reviews. More of the same will follow this decision. Notwithstanding the demands for special and careful review, this court must apply to the best of its ability and knowledge contemporarily established constitutional standards under the Eighth Amendment of the Constitution of the United States in its collateral review under 28 U.S.C. § 2254. With all deference and respect, it is the view here that such has been done.

In all of this review, it must be remembered that it was this veteran state trial judge who presided over

all of the trial court proceedings resulting in the determination of guilt an dit was he and not the reviewing appellate court and not this court, who saw all of the witnesses, heard and dealt with this case literally in all of its flesh and blood dimensions. In the precise areas of credibility determinations, the same should rest primarily and fundamentally with him and not with the reviewing courts, except upon a determination of a constitutional error.

There is no *constitutional* basis to disturb the imposition of the death penalty by this state trial judge in this case under 28 U.S.C. § 2254. Therefore, the writ must be DENIED. IT IS SO ORDERED.

APPENDIX A

35-50-2-9 Death sentence

Sec. 9 (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

(E) Kidnapping (IC 35-42-3-2).

(F) Rape (IC 35-42-4-1).

(G) Robbery (IC 35-42-5-1).

(H) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either:

(A) the victim was acting in the course of duty; or

(B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction;

(B) under the custody of a county sheriff;

(C) on probation after receiving a sentence for the commission of a felony; or

(D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The victim of the murder was less than twelve (12) years of age.

(12) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court

shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As amended by P.L. 332-1987, SEC. 2; P.L. 320-1987, SEC. 2; P.L. 296-1989, SEC. 2; P.L. 138-1989, SEC. 6; P.L. 1-1990, SEC. 354.*

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Date: May 8, 1992

BEFORE: HONORABLE WALTER J. CUMMINGS, Circuit Judge

HONORABLE HARLINGTON WOOD, JR., Circuit Judge*

HONORABLE FRANK H. EASTERBROOK, Circuit Judge

No. 91-1509

THOMAS SCHIRO,
Petitioner-Appellant

v.

RICHARD CLARK, Superintendent,
and INDIANA ATTORNEY GENERAL,
Respondents-Appellees

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 83 C 588, Judge Allen Sharp

JUDGMENT—WITH ORAL ARGUMENT

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

*** Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.**

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 91-1509

THOMAS SCHIRO,
Petitioner-Appellant,
v.

RICHARD CLARK, Superintendent,
and INDIANA ATTORNEY GENERAL,
Respondents-Appellees.

Argued Oct. 15, 1991

Decided May 8, 1992

Before CUMMINGS, WOOD, Jr.,* and EASTERBROOK, Circuit Judges.

CUMMINGS, Circuit Judge.

A broken iron, a shattered vodka bottle, pictures of the lifeless naked body of Laura Luebbehusen covered with blood and bruises, a warning note left for a friend—these trial exhibits relate the nightmarish facts of the case before us.

An Indiana jury convicted Thomas Schiro of the rape and murder of 28-year-old Evansville, Indiana resident, Laura Jane Luebbehusen. For this crime the trial judge sentenced Schiro to death despite the jury's recommendation that Schiro receive a sentence of life imprisonment. Schiro challenged the trial court's imposition of the death penalty in the Indiana Supreme Court, one on direct appeal and two additional times on collateral review. The Indiana Supreme Court affirmed Schiro's conviction and sentence in each case, and the Supreme Court of the United States denied Schiro's petition for writ of certiorari from each of the three Indiana Supreme Court judgments. Schiro sought post-conviction relief from the federal district court for the Northern District of Indiana pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254. In a decision on the merits, Chief District Court Judge Allen Sharp denied Schiro's petition for habeas corpus relief and issued a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253 and Rule 22(b), Federal Rules of Appellate Procedure. On appeal this Court's jurisdiction stems from 28 U.S.C. § 1291.

Because this case involves the death penalty, and because of the views of three Supreme Court Justices (Brennan, Marshall, and Stevens), we have exercised the meticulous care that such review requires, see *Schiro v. Indiana*, 493 U.S. 910, 913 n. 9, 110 S.Ct. 268-270 n. 9, 107 L.Ed.2d 218 (1989) (Stevens, J., respecting denial of certiorari), and have examined the record in its entirety. After thorough review, and for the reasons set forth below, we affirm the judgment of the district court.

I.

A. *Facts*

The evidence adduced at trial viewed in the light most favorable to the state's case against the defendant reveals the following facts.[1] On February 4, 1981, Thomas

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* Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.

[1] This Court interprets the facts in the light most favorable to the state's case against the defendant. However, our presentation of the facts, like that of the Indiana Supreme Court, must necessarily rely upon the defendant's account of the events as related

Schiro was serving a three-year suspended sentence for robbery, a class C felony, at the Second Chance Halfway House in Evansville, Indiana. R. 113 (pre-sentence investigation report), R. 889-891 (testimony of Kenneth Hood).[2] That facility houses criminals sent for counseling and treatment rather than incarceration. *Id.* at R. 888-889. While in the work-release program, Schiro worked across the street from Laura Luebbehusen's home. R. 1067-1069 (testimony of Robert Wheeler), R. 204-205 (testimony of Kenneth Hood).

At approximately 7:00 p.m. on February 4, Schiro went to an Alcoholics Anonymous meeting. R. 1435 (testimony of Mary Lee). Instead of staying for his 8:00 p.m. meeting, Schiro went to a liquor store and stole an alcoholic beverage. *Id.* at R. 1435, 1437. He took the liquor with him and went to see "quarter movies," which were characterized as hard core pornography. *Id.* at R. 1435, 1437-1439, R. 1743 (testimony of Dr. Frank Osanka). A woman who worked as a cashier at the quarter movie porn shop threw Schiro out when Schiro exposed himself to her. *Id.* at R. 1743. From there Schiro went directly to Ms. Luebbehusen's apartment. R. 1439 (testimony of Mary Lee). The time then was approximately 9:30 p.m. *Id.*

Schiro knocked on Ms. Luebbehusen's door and asked if he could use her phone on the pretext that his car would not start. R. 905-906 (testimony of Kenneth Hood). R. 1425 (testimony of Mary Lee). After he pretended to use the phone, Schiro asked to use the bathroom. R. 1425-1426 (testimony of Mary Lee). When he came out of the bathroom Schiro was exposed and Luebbehusen became freightened. *Id.* at R. 1426. In an attempt to calm her, Schiro told Luebbehusen that he did not want to hurt her, that he was gay, and that he was just trying to win a bet that he could "get it on" with a woman. *Id.* Schiro went through the small apartment looking for drugs and money. *Id.* at R. 1746. He came back with drugs and two dildos. *Id.* Schiro told Luebbehusen to drink some liquor and take drugs as he did. *Id.* at R. 1745-1746, 1748. Schiro also told Luebbehusen to insert a dildo into his anus but he found that very painful. *Id.* at R. 1746-1747. Luebbehusen told Schiro that she was gay, that she had been raped as a child, that she had never had sex before, and that she did not want to have sex. *Id.* at R. 1745, 1747. Schiro then raped her. *Id.*[3] When Schiro left the room, Lubbehusen tried to leave but Schiro pulled her back in the house, dragged her by her hair, told her not to try to leave again and raped her a second time. *Id.* at R. 1749. When the liquor ran out, Schiro took her with him to get some more. R. 1441 (testimony of Mary Lee). When they returned to Luebbehusen's home Schiro raped her a third time and then passed out on the couch. R. 1428 (testimony of Mary Lee), R. 1738, 1751 (testimony of Dr. Frank Osanka). When Schiro woke up, Luebbehusen was dressed and headed out the door. R. 1428 (testimony of Mary Lee). Luebbehusen told Schiro that she would not turn him in and was just going to find her girlfriend. *Id.* at 1430. Schiro wouldn't let her leave and Schiro believed that she then fell asleep. R. 1750 (testimony of Dr. Frank Osanka). At that time Schiro decided that he had to kill her so that she couldn't report the rapes.

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to persons who subsequently testified at trial. Ms. Leubbehusen, of course, lost her voice and her ability to tell her story when she lost her life.

[2] Unless otherwise specified, all record citations refer to the proceedings before the Honorable Samuel Rosen, who presided at defendant's trial.

[3] We regret the Indiana Supreme Court's statement that according to Mary Lee, Schiro "told Leubbehusen he would make love to her." As far as we can tell, Mary Lee's testimony never used or suggested the term "made love," with its consensual connotations. Lee said that Schiro said "he did it to [Leubbehusen]," and that he raped her. R.1426, 1427.

R. 1428-1429 (testimony of Mary Lee). Schiro hit her on the head with a vodka bottle until it shattered. *Id* at R. 1428, 1429, 1430. Luebbehusen was fighting Schiro. *Id*. He picked up an iron and beat her with it; she was fighting him. She was still fighting him when he strangled her to death. *Id*., R. 647-648 (testimony of Dr. Albert Venables.) He then dragged her body from the bedroom to the living room where he performed vaginal and anal intercourse on the corpse and chewed on several parts of her body. R. 44 (psychiatric evaluation by Dr. Bernard Woods), R. 1429 (testimony of Mary Lee), R. 1738, 1751 (testimony of Dr. Frank Osanka).

When Schiro left Luebbehusen's house he took one of the plastic dildos with him and threw it in the trash behind a tavern in Vincennes. R. 1431 (testimony of Mary Lee). Schiro also took gloves that he had been wearing so as not to leave any fingerprints. *Id*. at R. 1432, 1433. He gave the gloves to his girlfriend Mary Lee who washed them, cut them in little pieces and threw them away.[4]

The following morning, February 5, 1981, Luebbehusen's roommate Darlene Hooper and her ex-husband Michael Hooper discovered Luebbehusen's body near the doorway. R. 439 (testimony of Michael Hooper). Luebbehusen's legs were spread apart and her slacks were pulled down around her ankles. *Id*. at R. 442. She had many bruises and cuts on her body, which included tooth marks, and a vaginal laceration. R. 653, 649, 657, 661-662 (testimony of Dr. Albert Venables). Blood covered the walls and floor, and parts of the house were in disarray. R. 442 (testimony of Michael Hooper), R. 543-547 (testimony of Dennis Buickel). Michael Hooper called the police, who recovered a shattered vodka bottle and a broken iron in addition to other evidence. R. 439

[4] Lee later turned the pieces over to detectives. R.1433 (testimony of Mary Lee), R.808 (testimony of Donald Erk).

(testimony of Michael Hooper), R. 479, 480, 552-554 (testimony of Dennis Buickel).

A few days later, Luebbehusen's automobile was discovered approximately one block away from the Second Chance Halfway House. R. 939-940 (testimony of Keith Shiver).[5]

B. *Procedural History*

Because the judicial system has considered Schiro's case for over ten years, this section briefly addresses the major procedural history of Schiro's case. On September 12, 1981, in the Brown Circuit Court, in Nashville, Indiana, petitioner Thomas Nicholas Schiro was convicted of murder while committing or attempting to commit rape, Ind.Code § 35-42-1-1(2) (Burns 1979). On October 2, 1981, Judge Samuel R. Rosen pronounced a sentence of death despite a jury recommendation to the contrary. Because Judge Rosen imposed the death penalty, the case was automatically appealed to the Indiana Supreme Court. While the case was pending on direct review, the Indiana Supreme Court granted the state's petition to remand the case to Judge Rosen to make written findings of fact regarding aggravating and mitigating circumstances. Judge Rosen affirmed that at sentencing the state had proved the existence of one aggravating circumstance beyond a reasonable doubt—that "the defendant committed the murder by intentionally killing the victim while committing or attempting to commit * * * rape." Trial Court's Nunc Pro Tunc Pronouncement of Sentencing of February 23, 1983. Judge Rosen found no mitigating factors. *Id*. On direct appeal to the Indiana Supreme Court, Schiro raised numerous issues. He claimed that the Indiana death penalty statute violated the In-

[5] A police search of the defendant's room uncovered additional physical evidence of the crime. R.735-747 (testimony of Donald Erk).

diana and United States Constitutions, the trial court erred in imposing the death penalty, the warrant for the search of his room was improperly issued, his confessions were unlawfully admitted into evidence, a letter he wrote regarding his prior criminal acts was improperly excluded from evidence, the jury was not supplied with proper verdict forms, and the pre-sentence report contained improper information. The Indiana Supreme Court rejected each of Schiro's arguments, upheld his conviction and sentence, and remanded the case to the trial court for determination of the date of execution of the death sentence. *Schiro v. State*, 451 N.E.2d 1047 (1983) (*"Schiro I"*). At that time, Schiro sought review of his death penalty conviction in the Supreme Court of the United States but it denied his petition for writ of certiorari. *Schiro v. Indiana*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699.

Schiro petitioned for post-conviction relief in the Brown Circuit Court on May 11, 1984. His petition was heard by the Honorable James M. Dixon acting as a special judge. After a hearing, Judge Dixon denied the petition. The Indiana Supreme Court reviewed Schiro's post-conviction claims that the trial judge who sentenced him was biased and improperly considered evidence of Schiro's behavior at trial, and that he was denied effective assistance of counsel. Again, the Indiana Supreme Court affirmed the judgment of the trial court. *Schiro v. State*, 479 N.E.2d 556 (1985) (*"Schiro II"*), and the Supreme Court of the United States again denied Schiro's petition for writ of certiorari to vacate the death sentence. *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986).

Schiro filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana. Chief Judge Allen Sharp remanded the case to the Indiana courts in order for Schiro to exhaust all available state remedies. He then filed a second petition

for post-conviction relief in the Indiana Circuit Court, which petition was reviewed and denied by Special Judge John Baker of Bloomington, Indiana. The Indiana Supreme Court reviewed Schiro's case for the third time and again affirmed. It rejected Schiro's contentions that he was denied effective assistance of counsel at trial (on direct appeal and on his first petition for post-conviction relief), that the trial court erred in finding that certain allegations were *res judicata* or waived, that the jury's guilty verdict for murder while committing a rape established that the defendant lacked the requisite mental state required for imposition of the death penalty, and that these alleged errors, taken together, constituted prejudice warranting reversal. *Schiro v. State*, 533 N.E.2d 1201 (1989) (*"Schiro III"*), certiorari denied, *Schiro v. Indiana*, 493 U.S. 910, 110 S.Ct. 268, 107 L.Ed.2d 218.

The case was then fully and independently reviewed on habeas corpus by Chief Judge Sharp of the Northern District of Indiana, who issued a final judgment denying habeas relief, 754 F.Supp. 646 (N.D.Ind.1990), and also issued a certificate of probable cause to appeal. This Court has assumed jurisdiction under 28 U.S.C. § 1291.

II.

A. Judicial Imposition of the Death Penalty

Under Indiana law, a trial judge determines a defendant's sentence after the jury issues its sentencing recommendation. Indiana Code § 35-50-2-9 (Burns 1979) states that "[t]he court shall make the final determination of the sentence, after considering the jury's recommendation." The Indiana Code further states that "[t]he court is not bound by the jury's recommendation." On appeal in this Court, Schiro argues that the Indiana Death Penalty statute violates constitutional guarantees provided by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The constitutional challenge raised by petitioner would indeed be a significant one if the Supreme Court had not largely resolved the matter in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). In *Spaziano*, the Court held that a judge may impose the death penalty despite a jury's recommendation to the contrary, since defendants have no constitutional right to jury sentencing in capital cases. Subsequent Supreme Court decisions have confirmed that holding. "The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Clemons v. Mississippi*, 494 U.S. 738, 745-746, 110 S.Ct. 1441, 1446-1447, 108 L.Ed.2d 725 (1990) (quoting *Cabana v. Bullock*, 474 U.S. 376, 385, 106 S.Ct. 689, 696, 88 L.Ed.2d 704 (1986)). Schiro concedes that the constitution does not require jury sentencing in capital cases. He also concedes that under *Spaziano* a judge may impose the death penalty despite a jury's recommendation to the contrary. However, he attempts to disinguish *Spaziano* on the basis that the "*Tedder* standard" [6] was employed in *Spaziano* but not in his case. According to Schiro, the *Tedder* standard is constitutionally necessary under *Spaziano*. Thus he contends that the Indiana Supreme Court's failure to adopt and employ the *Tedder* standard in his case renders his sentence unconstitutional.

This Court is not persuaded that *Spaziano* requires or that reasoning commends such a holding. Under *Spaziano*, a reviewing court's responsibility "is not to second-guess the deference accorded to the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." *Id.* at 468 U.S. at 465, 104 S.Ct. at 3165. See also *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Review designed to invalidate arbitrary or discriminatory sentences not only provides a more direct link to values of fairness and consistency, but also provides a more judicially manageable standard than reviewing the level of judicial deferance accorded to the jury. Short of mind-reading or the submission of evidence regarding a sentencing judge's thought processes, this Court knows of no way to distinguish a case in which a trial judge gave serious consideration to the jury's sentencing recommendation before rejecting it, from a case in which the trial judge did not give serious consideration to the jury's recommendation before rejecting it. In short we cannot discern a practicable standard for reviewing the amount of deference the trial judge accorded to the jury's recommendation.

This Court, of course, seeks to ensure that the application of the death penalty statute is neither arbitrary nor discriminatory. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), sets forth three criteria to determine whether a state has appropriately limited a sentencer's discretion. The statutory scheme must furnish clear and objective standards, specific and detailed guidance, and an opportunity for rational review of the process for imposing the death sentence. *Id.* at 427, 100 S.Ct. at 1764 (Stewart, J., plurality opinion); *Stringer v. Black*, —— U.S. ——, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (explicitly applying the *Godfrey* principle to a "weighing" state). Furthermore, a sentencing scheme must narrow the class of persons eligible for the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Indiana's list of aggravating and mitigating factors provides fixed, objective and uniform discretionary constraints to guide death penalty sentencing decisions. Although Indiana

[6] Under the "*Tedder* standard," *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), a trial judge may sentence a defendant to death despite a jury recommendation to the contrary if the evidence favoring the death penalty is "so clear and convincing that no reasonable person could differ." Although the Indiana Supreme Court had not adopted the *Tedder* standard at the time of Schiro's case, that court subsequently adopted it in *Chavez v. State*, 534 N.E.2d 731 (1989).

vests sentencing authority in a judge rather than a jury, the judge's discretion is limited by the same factors which limit the jury's sentencing discretion. Before a judge can impose the death sentence she must find the existence of one of nine aggravating circumstances beyond a reasonable doubt. Ind.Code § 35-50-2-9 (Burns 1979). In addition, the trial judge must find that any aggravating factors outweigh any mitigating factors. *Id.* Not only has Indiana enumerated clear, objective and specific standards for imposing the death penalty, but it has also required the sentencing judge to make written findings with respect to those factors in order to facilitate appellate review. Ind.Code § 35-4.1-4-3 (Burns 1979). As a result of these safeguards, the Indiana death penalty statute will not lead to arbitrary or discriminatory results generally or in Schiro's case. There is no one set way for a state to set up its capital sentencing scheme. *Spaziano*, 468 U.S. at 464, 104 S.Ct. at 3164. In light of studies that jury sentencing leads to racial discrepancies in capital sentencing, *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), a state might rationally conclude that judicial sentencing could prove to be a more desirable alternative. Regardless of its rationale, a state may constitutionally establish pure judicial sentencing in capital cases or it may permit judicial sentencing upon a non-binding, advisory recommendation from a jury, as Indiana has chosen to do.

Schiro does not contend that imposition of the death sentence in his case was either arbitrary or discriminatory. His crime was not only heinous but deliberate and calculated. As Judge Rosen noted in his pronouncement of sentence, this crime involved cruel and sadistic acts; yet Schiro wore gloves while committing those acts so as not to leave fingerprints. He makes no claim that he is innocent of the crimes charged, nor could he in light of the overwhelming testimony and physical evidence. In addition, extensive evidence revealed that he committed numerous other brutal and sadistic acts which cast doubt on his character and his ability to be rehabilitated.

Some may contend that "a judge should not have the awesome power to reject a jury recommendation of life." *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (Marshall, J., dissenting from denial of certiorari). But under the Supreme Court's jurisprudence, which is binding on this Court, a state may elect to give its trial judges such power. While a judge's power may exceed constitutional boundaries if her judgments are arbitrary or discriminatory, what constitutes arbitrary or discriminatory sentencing need not be defined in relation to a standard of judicial deference to the jury. Because the Supreme Court established only that *Tedder* was a "significant safeguard," *Spaziano*, 468 U.S. at 465, 104 S.Ct. at 3165, not that it was an essential one, we reject Schiro's assertion that the sentencing scheme applied in his case can be meaningfully distinguished from that at issue in *Spaziano*.

B. *Double Jeopardy*

Schiro also contends that imposition of the death penalty in his case violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). That Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The prohibition against Double Jeopardy only applies "if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984). Thus Schiro's argument hinges on his claim that he was acquitted of intentional murder. Specifically, Schiro claims that either the jury's conviction for murder while committing or attempting to commit a rape constituted

an acquittal on the murder charge, or that the jury's sentencing recommendation acted as an acquittal. Each of these assertions will be addressed in turn.

At trial, the jury was offered potential verdicts of murder, murder while committing or attempting to commit rape, and murder while committing or attempting to commit deviate sexual conduct. R. 108. The jury found Schiro guilty of felony-murder, murder during the course of a rape, and left blank spaces beside the other two counts on the jury form. R. 108. The felony-murder charge does not require the prosecution to prove that Schiro killed Luebbehusen intentionally. Schiro argues that the jury's conviction for felony-murder acted as an acquittal on the intentional murder charge and that the jury necessarily found that Schiro did not murder Luebbehusen intentionally. In order to assess the effect of the jury's findings, this Court looks to state law. *United States ex rel. Young v. Lane*, 768 F.2d 834, 841 (7th Cir.1985) ("states possess substantial latitude to decide *which* decisions in the criminal process are to be treated as 'acquittals' "), certiorari denied, *Young v. Lane*, 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300. The Indiana Supreme Court squarely rejected Schiro's argument that he was acquitted of intentional murder. *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989). That Court stated that "[felony murder] is not an included offense of [murder] and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider." *Id.* Since the jury's verdict did not amount to an acquittal under the state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen. Therefore, this double jeopardy argument must fail.[7]

[7] The collateral estoppel argument raised, not by Schiro, but by Justice Stevens' opinion respecting denial of certiorari in this case, does not change our understanding. 493 U.S. 910, 110 S.Ct. 268, 270, 107 L.Ed.2d 218. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), bars relitigation where an issue of ultimate fact has been previously determined by a valid and final judgment. However, the defendant must show that the jury's verdict actually and necessarily determined the issue he seeks to foreclose. *United States v. Patterson*, 827 F.2d 184 (7th Cir.1987) (per curiam). Here Schiro's conviction for murder/rape did not act as an acquittal with respect to the pure murder charge as a matter of state law. Thus the jury's verdict did not determine the issue of intentionality.

Next, we address Schiro's contention that the jury's sentencing recommendation constituted a final judgment of acquittal. Schiro cites *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), to support his proposition that the Indiana jury's advisory sentencing recommendation operated as an acquittal. Once again, the Supreme Court's holding in *Spaziano* invalidates Schiro's claim. According to *Spaziano*, *Bullington* does not apply to cases in which a judge imposes the death penalty against the jury's advisory recommendation. *Spaziano*, 468 U.S. at 453, 104 S.Ct. at 3158. Unlike the binding sentencing recommendations issued by Missouri juries at the time of *Bullington*, Indiana law leaves no doubt that its juries' sentencing recommendations are only recommendations. The assumption that "the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence" is no longer tenable in light of *Spaziano*. *Cabana v. Bullock*, 474 U.S. 376, 388 n. 4, 106 S.Ct. 689, 697, n. 4, overruled on different grounds, *Pope v. Illinois*, 481 U.S. 497, 504 n. 7, 107 S.Ct. 1918, n. 7, 95 L.Ed.2d 439 (1987). Schiro had no legitimate expectation that the jury's recommendation would be his final sentence. Cf. *United States v. Di Francesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) (holding that modification of a sentence is not violative of the Double Jeopardy Clause when a defendant has no legitimate expectation of

finality in the original sentence). No final conviction could be entered until the sentence was entered. And under Indiana law, no sentence could be entered, except by the trial judge—the only person given authority to determine the defendant's sentence. Because the jury's sentencing recommendation was not a final judgment, it could not act as an acquittal. Judge Rosen declared that the state had proved the existence of an aggravating factor beyond a reasonable doubt [8] and the jury never acquitted Schiro on the element of intentionality. Thus we reject Schiro's double jeopardy claim.

C. *Ineffective Assistance of Counsel*

Schiro also contends that he was denied effective assistance of counsel. He bases his contention on four alleged failures of trial counsel, namely, (1) counsel failed to present evidence of mitigating circumstances, (2) counsel failed to adequately prepare or investigate the case, (3) counsel failed to submit guilty but mentally ill verdict forms to the jury and (4) counsel failed to request that the jury be sequestered or adequately admonished. In order to prove that he received ineffective assistance of counsel, Schiro must show both that counsel's performance fell below an objective standard of reasonableness and that but for counsel's unreasonable conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 700, 104 S.Ct. 2052, 2071, 80 L.Ed.2d 674 (1984), rehearing denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864; *United*

[8] The Indiana Supreme Court held that "[t]he [trial] court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt." *Schiro v. State*, 479 N.E.2d 556. Whether the trial court appropriately determined the existence of an aggravating factor under Indiana law is a question of state law which Schiro has not asked this Court to review and which is not within the ambit of habeas review.

States v. Lane, 819 F.2d 798, 802 (9th Cir.1987). Although this standard applies to counsel's conduct as a whole, for clarity this Court will examine Schiro's first and primary contention separately.

D. *Mitigating Circumstances*

Schiro alleges that the trial judge's finding of no mitigating circumstances was due to his trial counsel's failure to present any evidence of mitigating circumstances to the court. As an initial matter, this Court notes that this assertion is patently incorrect. His counsel did attempt to prove the existence of a mitigating factor, he strenuously argued that Schiro's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication"—one of the seven mitigating factors provided by Indiana's death penalty statute. Indiana Code § 35-50-2-9.

Judge Rosen's denial of the existence of any mitigating factors was not because Schiro's counsel did not raise any argument for mitigation, but because the judge found that such arguments did not justify mitigation. At trial, Schiro argued that he was a sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong. In support of this assertion, his expert witness, Edward Donnerstein, testified that after a short exposure to aggressive pornography "non-rapist populations * * * begin to endorse myths about rape." R. 1549 (testimony of Edward Donnerstein). "They begin to say that women enjoy being raped and they begin to say that using force in sexual encounters is okay. Sixty percent of the subjects will also indicate that if not caught they would commit the rape themselves." *Id.* In addition to Mr. Donnerstein's testimony that pornography generally encourages men to commit acts of violence against women, one of defendant's other expert witnesses testified that

Schiro's viewing of pornography actually encouraged him to commit the acts of violence at issue in this case. Dr. Frank Osanka testified that Schiro viewed pornographic films from age six, and throughout his childhood and his adulthood, that led him to be aroused by women's pain and taught him techniques of rape. R. 1713, 1727 (testimony of Dr. Frank Osanka, listing at least two specific films which encouraged Schiro's criminal activity). A written autobiographical statement of petitioner's which was read to the jury is perhaps most telling: "I can remember when I get horny from looking at girly books and watching girly shows that I would want to go rape somebody. Every time I would jack off before I come I would be thinking of rape and the women I had raped and remembering how exciting it was. The pain on their faces. The thrill, the excitement." R. 1368-1369 (Schiro's autobiographical statement). At closing argument Schiro's counsel relied on Dr. Osanka and Mr. Donnerstein to support his claim that "the pattern is clear, premature exposure to pornography and continual use with more violent forms created one thing, created a person who no longer distinguishes between violence and rape, or violence and sex."

Schiro contended either that pornography is a mitigating factor akin to intoxication or mental disease or defect which rendered him unable to appreciate the criminality of his conduct, or that pornography caused him to suffer from sexual sadism, which in turn rendered him unable to appreciate the wrongfulness of his conduct. After hearing such evidence, Judge Rosen rejected the arguments on the basis that defendant was sadistic, not psychotic or insane, and on the basis that he was able to appreciate the wrongfulness of his conduct. Clearly, Indiana may determine that sadism (or voyeurism, exhibitionism, and necrophilia as also claimed) does not amount to a mental disease or defect which warrants reduced punishment. This is particularly so because the primary manifestation of these

conditions is criminal, anti-social conduct and under Indiana law "[t]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." R. 405, *Richardson v. State*, 170 Ind.App. 212, 351 N.E.2d 904 (1976). Moreover, the trial judge could permissibly find from the evidence both that Schiro understood the criminality of his conduct and that pornography is not a mental disease or defect which would permit a finding of insanity.

The troubling aspect of Schiro's defense is that his argument that pornography reduced his capacity to understand the criminality of his conduct, if successful, would not only excuse him from imposition of the death penalty but further excuse him for his criminal conduct altogether on the basis that he was not guilty by reason of insanity. Under Schiro's theory pornography would constitute a legal excuse to violence against women. This Court previously addressed the issue of pornography in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (1985), affirmed, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986). There we accepted the premise of anti-pornography legislation that pornographic depictions of the subordination of women perpetuate the subordination of women and violence against women.[9] However, we held that under the First Amendment pornography may not be banned because its harmful effects depend on mental intermediation. 771 F.2d at 329. It would be impossible to hold both that pornography does not directly cause violence but criminal actors do, and that criminal actors do not cause violence, pornography does. The result would be to tell Indiana that it can neither ban pornography nor hold criminally responsible persons who are encouraged to commit violent acts because of pornography! The recognition in *Hudnut* that pornography leads to violence against women does not require Indiana to establish a defense of insanity by por-

[9] See Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, 195-214 (1989).

nography.[10] In *Hudnut* we said that pornographers may be liable for rape just as the instigator of a riot could be held liable for inciting that riot. 771 F.2d at 333. *Hudnut* does not suggest that the rioter or the rapist is not also culpable for his own conduct.

As for the other mitigating factors, defense counsel is not required to present mitigating evidence where none exists. Cf. *Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir. 1988), certiorari denied, 494 U.S. 1047, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). If Schiro alleges prejudice from his trial counsel's failure to present mitigating evidence at trial, as he does here, he must offer some piece of mitigating evidence that should have been presented to the trial court but wasn't. He offers none, and we fail to see what evidence of mitigation might have been offered.[11] Schiro did present evidence relating to his drug and alcohol use, but the trial court found that evidence insignificant since Schiro acted deliberately and had the capacity to appreciate the wrongfulness of his conduct. As for his criminal history, Schiro's record is replete with violent crimes. R. 113. His own expert believed that Schiro had committed some nineteen to twenty-four rapes. R. 1721 (testimony of Dr. Frank Osanka). Schiro's girlfriend testified regarding Schiro's numerous brutal, sadistic and life-threatening assaults on herself and her son. R. 1181, 1446, 1461, 1463, 1465, 1467, 1472. Linda

[10] Under repeated questioning by Judge Rosen as to the relevance of his testimony, Schiro's own witness conceded that even though the viewing of pornography is relevant to show whether Schiro sees rape as a violent crime, viewing pornography does not have "any relationship to competency or legal sanity." R.1560-1561 (testimony of Mr. Donnerstein). Indiana can decide, and appears to have decided in this case, that a defendant cannot excuse his conduct by showing that in spite of his awareness of a person's non-consent to sexual relations, he believed that he had a right of sexual access or dominion over that person.

[11] Indiana Code § 35-50-2-9(c) (Burns 1979) sets forth mitigating circumstances appropriate for consideration.

Summorford testified that Schiro broke into her home, held a gun to her son's head and raped her in front of her six-year-old daughter who has cerebral palsy. R. 1830-1841. The jury's verdict settled any questions as to whether the victim consented to sexual intercourse, see *O'Connor v. State*, 529 N.E.2d 331 (Ind.1988), and she certainly did not consent to be murdered. Schiro's participation was as a principal and that participation was far from minor. Moreover, Schiro did not act under the domination of another person. Because Schiro has not shown any evidence of mitigating factors that his trial counsel should have offered but unreasonably and prejudicially failed to offer, his ineffective assistance claim on this point is devoid of merit.

Schiro's other ineffective assistance claims are equally devoid of merit. He has not shown and the record does not reveal evidence that his trial counsel failed to prepare Schiro's case adequately. Counsel's failure to submit certain verdict forms to the jury was not prejudicial since the jury was accurately instructed on those possible verdicts. Finally, we do not presume prejudice where the defendant's counsel has failed to request that the jury be sequestered. *Bell v. Duckworth*, 861 F.2d 169, 170-171 (7th Cir.1988), certiorari denied, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). Moreover, in contrast to Schiro's assertion, Judge Rosen repeatedly admonished the jury not to talk about the case with others. R. 579, 702-703, 934-936, 1064-1065, 1169-1170, 1288-1290, 1497-1498, 1660, 1791-1793.

Petitioner has not shown that his counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by any such conduct. He has therefore failed to meet either of his burdens.

E. *Admissibility of Confessions*

Schiro admitted killing Luebbehusen to Kenneth Hood, Second Chance Halfway House Executive Director. At trial, Hood testified regarding the substance of Schiro's

confession. R. 888-935. On appeal petitioner complains that his confession was obtained in violation of the Fifth, Fourth and Fourteenth Amendments to the Constitution because he was not notified of his *Miranda* warnings; he therefore argues that his confessions and the ensuing confessions to his girlfriend should have been suppressed at trial.

The procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), only apply to custodial interrogations. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990); *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). In order to determine whether Schiro's confession to Hood was made during the course of a custodial interrogation, the Indiana Supreme Court examined the surrounding circumstances. According to that court, Schiro approached his work release counselor and asked to discuss something "heavy." The work release counselor thought that Shiro's problem concerned his alcoholism and referred him to Executive Director Ken Hood, to whom Schiro had spoken earlier that day. Hood felt that Schiro wanted to talk and asked him general questions regarding the reason for his seeking their conversation.

> "Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder [which Schiro had confessed to Hood]. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station."

451 N.E.2d at 1047, 1060-1061.

On the basis of these facts, the Indiana Supreme Court held that Schiro was not subject to custodial interrogation at the time of his confession to Hood. The question of custodial interrogation is a mixed question of law and fact. This Court has recently noted that mixed questions of law and fact should be reviewed under a clearly erroneous standard. *United States v. Levy*, 955 F.2d 1098, 1103 n. 5 (7th Cir.192); *Mars Steel Corp. v. Continental Bank*, 880 F.2d 928, 933-937 (7th Cir. 1989) (en banc); *Mucha v. King*, 792 F.2d 602, 604-606 (7th Cir.1986); but see *United States v. Hocking*, 860 F.2d 769 (7th Cir.1988). We have suggested without deciding that a clearly erroneous standard of review is appropirate in habeas corpus cases as well as other types of cases. *Stewart v. Peters*, 958 F.2d 1379 (7th Cir.1992); *Hanrahan v. Greer*, 896 F.2d 241, 244 (7th Cir.1990). That question need not be resolved here since the outcome of our decision would be the same under either *de novo* or clear error review.

When reviewing whether a defendant was in custody at the time of a confession, this Court examines the totality of the circumstances, especially the degree of restraint on the suspect's freedom. *United States v. Hocking*, 860 F.2d 769, 772 (7th Cir.1988) (noting that the key determination is whether at the time of interrogation the defendant was subjected to a "restraint on [his] freedom of movement of the degree associated with formal arrest"). Schiro contends that he was in custody at the time of his confession to Hood because the Second Chance Halfway House is a penal facility which confines residents unless they have express authorization to leave.

Sureeporn Roll v. State, 473 N.E.2d 161, 163 (Ind.App. 1985).

This Court rejects Schiro's assertion that any statement made by a defendant while he is under some type of supervision *ipso facto* constitutes custodial interrogation. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 2397 (rejecting "the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent"). Cf. *Williams v. Chrans*, 945 F.2d 926, 950-954 (7th Cir.1991) (questioning by probation officer did not constitute custodial interrogation); *Minnesota v. Murphy*, 465 U.S. 420; 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (routine meeting between defendant and his parole officer not considered to be custodial interrogation).

Schiro voluntarily approached Hood and asked to speak with him. Schiro was free to leave Hood's office at any time. The environment at the time of Schiro's confession to Hood bears slight resemblance, if any, to the type of coercive police conduct which the Fifth Amendment was designed to prevent. Cf. *Roberts v. United States*, 445 U.S. 552, 560-561, 100 S.Ct. 1358, 1364-1365, 63 L.Ed.2d 622 (1980) (no custodial interrogation where defendant initiated interview with investigators); *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630 ("volunteered statements are not barred by the Fifth Amendment"). Unlike statements made during custodial interrogation without prior *Miranda* warnings, statements made during a noncustodial interrogation without such *Miranda* warnings do not enjoy any presumption of coercion. *United States v. Fazio*, 914 F.2d 950, 956 (7th Cir.1990). Because Schiro's confession to Hood was not made during custodial interrogation, *Miranda* warnings were not required and Hood's testimony regarding Schiro's confession was properly admitted into evidence at trial. As Schiro's confession was properly entered into evidence, this Court need not address Schiro's further claim that testimony regarding his voluntary confession to his girlfriend was unconstitutional as a fruit of the confession to Hood. No impropriety is asserted with respect to his confession to a fellow prisoner.

F. *Deceptive Behavior at Trial*

According to Judge Rosen, Schiro tried to deceive the jury into believing that he was mentally ill.[12] Judge Rosen stated:

> This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

Trial Court's Sentencing Judgment of October 2, 1981. On appeal, Schiro asserts violations of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because Judge Rosen allegedly based his decision to impose the death penalty on his outer chambers observation of Schiro.

The Indiana Supreme Court found that Judge Rosen did not consider Schiro's apparently deceptive behavior at trial as an aggravating factor which justified imposition of the death penalty. *Schiro v. State*, 479 N.E.2d 556 (1985). Rather, Judge Rosen's observation sought to explain why the jury recommended a sentence which was against the manifest weight of the evidence produced

[12] The trial judge was not the only one to observe that some of Schiro's mannerisms appeared to be "a caricature of someone mentally ill" R. 44 (psychiatric evaluation by Dr. Bernard Woods).

at trial. The Indiana Supreme Court's factual determination is binding on this Court absent clear error, 28 U.S.C. § 2254(d), which has not been shown.

G. *Manacles and Shackles*

Schiro contends that as he exited an elevator at the courthouse and passed through a hallway there, the jury viewed him in manacles and shackles. As a result he claims to have been denied both effective assistance of counsel and due process of law. A jury's inadvertent observation of a defendant in shackles and manacles outside the courtroom is presumptively non-prejudicial unless the defendant can affirmatively show that jurors were prejudiced by such an encouter. *United States v. Jones,* 696 F.2d 479 (7th Cir.1982), certiorari denied, 462 U.S. 1106, 103 S.Ct. 2453, 77 L.Ed.2d 1333 (1983). The state has a legitimate interest in seeking that the defendant once outside the courtroom remains in custody and does not flee. *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

The Indiana Supreme Court has distinguished between cases in which jurors see a prisoner in shackles while being transported to and from court, *Sweet v. State,* 498 N.E.2d 924, 929 (Ind.1986), and cases in which jurors see a shackled prisoner during court proceedings, *Walker v. State,* 274 Ind. 224, 410 N.E.2d 1190, 1193-1194 (1980). That court has held that reasonable jurors can expect a criminal defendant to be in manacles and shackles during breaks and while being transported. *Jenkins v. State,* 492 N.E.2d 666, 669 (Ind.1986). Accordingly, the Indiana Supreme Court determined that Schiro's allegation did not demonstrate prejudice. *Schiro III,* 533 N.E.2d 1201. Where the contact between the jury and the defendant was both fleeting and inadvertent, we agree that Schiro has not met his burden of showing prejudice.

III.

This Court has considered each of Schiro's arguments and for the foregoing reasons his constitutional claims are rejected. The judgment of the district court is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Caption Omitted in Printing)

NOTICE OF ISSUANCE OF MANDATE

Date: June 1, 1992

To: Geraldine J. Crockett
United States District Court
Northern District of Indiana
Room 102
South Bend Division
102 Federal Building
South Bend, IN 46601

From: Thomas, F. Strubbe, Clerk

Re: 91-1509
Schiro, Thomas v. Clark, Richard
83 C 588, Judge Allen Sharp

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[ ] No record filed
[x] Original record on appeal consisting of:

Enclosed:	To Be Returned At Later Date:
[ ] Volumes of pleadings	[2]
[ ] Loose pleadings	[ ]
[ ] Volumes of transcripts	[1]
[ ] Volumes of State Court pleadings	[16]
[ ] Volumes of State Court briefs	[7]

[ ] Volumes of State Court loose pleadings	[6]
[ ] Other _____	[ ]
_____	
Record being retained for use in Appeal No. _____	[ ]

* * * *

Copies of this notice sent to: Counsel of Record

(Affirmation Omitted in Printing)

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Caption Omitted in Printing)

August 25, 1992

This matter comes before the court for its consideration of the following documents:

1. MOTION TO RECALL MANDATE filed herein on 8/18/92, by counsel for the appellant.

2 MOTION TO ACCEPT PETITION FOR REHEARING IN BANC INSTANTER filed herein on 8/18/92, by counsel for the appellant.

3. VERIFIED PETITION TO RECALL THE MANDATE AND PERMIT THE FILING OF A PETITION FOR REHEARNG AND SUGGESTION FOR AND REHEARING IN BANC OUT OF TIME filed herein on 8/18/92, by the pro se appellant.

4. RESPONSE TO MOTIONS TO RECALL MANDATE AND ACCEPT PETITION FOR REHEARING INSTANTER filed herein on 8/25/92, by counsel for the appellees.

On consideration thereof,

IT IS ORDERED that the Motion to Recall the Mandate is DENIED.

IT IS FURTHER ORDERED that the Motion to accept Petition for Rehearing in Banc Instanter is

GRANTED and the Clerk of this court is directed to file as of 8/21/92 the petition for rehearing tendered by appointed counsel for the appellant.

IT IS FURTHER ORDERED that the Verified Petition to Recall the Mandate and Permit the Filing of a Petition for Rehearing and Suggestion for and Rehearing in Banc Out of Time is DENIED.

SUPREME COURT OF THE UNITED STATES

No. 92-7549

THOMAS SCHIRO,
Petitioner

v.

RICHARD CLARK, Superintendent, Indiana State Prison, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 17, 1993

(6)

No. 92-7549

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THOMAS N. SCHIRO,
Petitioner,
v.

RICHARD CLARK, Superintendent
Indiana State Prison and
INDIANA ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether the double jeopardy clause of the fifth amendment prohibits imposition of the death penalty on Thomas Schiro after the jury at his guilt trial implicitly acquitted him of the offenses that the state is required to prove beyond a reasonable doubt as the predicate for a death sentence?

Whether the fifth amendment doctrine of collateral estoppel bars the prosecution from obtaining Schiro's death sentence by relitigating elements of the offenses of which his trial jury implicitly acquitted him at the guilt trial, when the state is required to prove those same elements beyond a reasonable doubt as the precondition for a death sentence?

PARTIES TO THE ACTION

The names of all parties to the action in the court below appear in the caption of this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-7549

THOMAS N. SCHIRO,
Petitioner,
v.
RICHARD CLARK, Superintendent
Indiana State Prison and
INDIANA ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

On August 5, 1983, the Indiana Supreme Court affirmed, by a 3-2 majority, Schiro's convictions and death sentence on direct appeal. *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983). Certiorari was denied. *Schiro v. Indiana*, 464 U.S. 1003 (1983).

On June 28, 1985, the Indiana Supreme Court affirmed, by a 3-1 majority, the denial of Schiro's first state post-conviction relief petition. *Schiro v. State*, 479 N.E. 2d 556 (Ind. 1985). Certiorari was denied. *Schiro v. Indiana*, 475 U.S. 1036 (1986).

On February 8, 1989, the Indiana Supreme Court issued an opinion affirming, by a 3-2 majority, the denial of Schiro's second state post-conviction relief petition. *Schiro v. State*, 533 N.E.2d 1201 (Ind. 1989). Certiorari was denied. *Schiro v. Indiana*, 493 U.S. 910 (1989).

On December 26, 1990, the district court denied habeas corpus relief. *Schiro v. Clark*, 754 F. Supp. 646 (N.D. Ind. 1990). On May 8, 1992, the Seventh Circuit Court of Apeals affirmed the district court's denial of habeas corpus relief. *Schiro v. Clark*, 963 F.2d 962 (7th Cir., 1992). Rehearing and Suggestion for Rehearing En Banc was denied, without opinion, by the circuit court on September 8, 1992.

On May 17, 1993, this Court granted certiorari.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review decisions of the federal courts of appeals is invoked pursuant to 28 U.S.C. § 1254(1) and United States Supreme Court Rules 10 and 16. On May 8, 1992, the circuit court affirmed the district court's denial of habeas corpus relief. *Schiro v. Clark*, 963 F.2d 962 (7th Cir. 1992). On September 8, 1992, the Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the court of appeals without opinion. See *infra*, Appendix, pg. 5a.

By Order dated December 1, 1992, Justice Stevens extended the time for filing the Petition for Writ of Certiorari to and including February 5, 1993. On February 5, 1993, the Petition for Writ of Certiorari was docketed. The Brief in Opposition was filed on or about April 22, 1993. The Reply Brief of Petitioner was filed on or about April 28, 1993.

The Court granted certiorari on May 17, 1993. On June 17, 1993, the time for filing the brief of petitioner was extended to and including July 13, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. Constitutional Provisions Which The Case Involves

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT 14

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. State Statutory Provisions Which The Case Involves

Indiana Code § 35-41-2-2

(a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

(d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

Indiana Code § 35-41-4-3(2)

This provision of the state code sets forth when a subsequent prosecution is barred and is reprinted in the appendix to this brief.

Indiana Code § 35-42-1-1

A person who:

(1) knowingly or intentionally kills another human being; or

(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery;

commits murder, a felony.

Indiana Code § 35-50-2-9

This provision of the state code sets forth the death penalty provisions of state law and is reprinted in the appendix to this brief.

STATEMENT OF THE CASE

A. Trial Proceedings:

Schiro was charged with three counts of murder [1] for the death of a single victim: Count I, "knowing" murder (hereinafter referred to as *"mens rea* murder"); Count II, murder in the commission of a rape (hereinafter referred to as "felony murder—rape"); and Count III, murder in the commission of criminal deviate conduct (hereinafter referred to as "felony murder—criminal deviate conduct") [J.A. 3-5].

The state's theory at trial was that Schiro gained entry, under false pretenses, into the decedent's home. After Schiro and the decedent conversed and the decedent refused to engage in sexual intercourse, Schiro raped her [Tr.R. 1426-27, 829-830, 646]. Sometime later, Schiro fell asleep and was awakened by the decedent who was attempting to leave the house [Tr. R. 1428]; he stopped her, assaulted and killed her [Tr. R. 1428-29, 647]. These events took place over a number of hours.

The defense acknowledged the killing and conceded that Schiro caused it.[2] The principal dispute was whether

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[1] Ind. Code § 35-42-1-1 defines murder. It provides that: "[a] person who: (1) knowingly or intentionally kills another human being; or (2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, rape or robbery; commits murder, a felony."

[2] Schiro was living in a half-way house when the crime was committed. The weekend following the killing he confessed to state's witness, Mary Lee who was his girlfriend at the time [Tr. R. 1420, 1425-31].

Since the decedent's vehicle had been recovered near the half-way house, personnel there were directed to review the sign-in sheets to make sure all clients were signed in at the time the crime occurred [Tr. R. 1003-05]. They had discovered nothing unusual regarding the sign-in sheets [Tr. R. 1020]. Schiro approached his counselor and told him he needed to talk about something "heavy" that was

Schiro "knowingly" killed or whether, instead, the killing was the product of a sick mind plagued by a belief system ingrained with bizarre sexual ideation.

The dispute about Schiro's mental state began in pretrial pleadings [3] and continued throughout trial. The jury heard testimony from five mental health professionals: two were court-appointed; one was called by the state; and two were called by the defense. All professionals agreed that Schiro had some form of mental illness; they disagreed about the appropriate label and whether the illness constituted legal insanity.[4]

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more serious than his drug and alcohol problems [Tr. R. 1017-18]. Schiro said he could not handle this problem by himself [Tr. R. 1018]. The counselor sent Schiro to Ken Hood, the director of the half-way house [Tr. R. 1019]. Schiro confessed his involvement in the crime to Hood [Tr. R. 903]. Hood asked how that was possible when the sign-in sheet indicated he was at the facility when the crime occurred [Tr. R. 903-04]. Schiro then confessed that he had falsified the sign-in sheet [Tr. R. 904].

Schiro additionally confessed to defense expert, Dr. Frank Osanka. Dr. Osanka testified that Schiro was very forthcoming with him [Tr. R. 1689] and that Osanka was surprised by the fact that Schiro's statements were corroborated by other persons and the police investigation of the case [Tr. R. 1688-89, 1741]. Dr. Osanka was called in the defense case-in-chief and recounted Schiro's confession to him [Tr. R. 1738-52].

[3] See generally, discussion at pp. 42-43 and fn. 37-40.

[4] Dr. David Crane, testified that there was no "question" that Schiro suffered from "emotional difficulties" of "long standing duration" [Tr. R. 1871]. Court psychiatrist Dr. Bernard Woods concluded that Schiro was mentally ill but that the mental illness suffered by Schiro would not bring him within the legal definition of insanity. [Tr. R. 1415-16]. He interviewed Schiro on one occasion for 1¼ hours [Tr. R. 1401]. Court psychiatrist, Dr. Charles Crudden, acknowledged that Schiro had a history of suicide attempts [Tr. R. 1204]. Although he too interviewed Schiro on one occasion for approximately one hour [Tr. R. 1275], he noted that Schiro had a "blunted affect" [Tr. R. 1219], exhibited pressured or rapid speech patterns to the extent that Dr. Crudden was unable to take

Many state's witnesses had an opportunity to observe Schiro's personality or behavior and were cross-examined on that topic.[5] The defense case consisted entirely of mental health evidence [Tr. R. 1507 et seq.]. The jury heard evidence about Schiro's delusional system. Among other facts, including Schiro's inappropriate and bizarre sexual behavior, the jury heard extensive testimony regarding Schiro's affection for a mannequin in a department store window. This testimony included: a recount of instances where Schiro would talk to the mannequin; where he would become upset when her clothes and/or wig were changed; where he would apologize to the mannequin because of his relaionship with another woman; and times when he would take people downtown to see her [Tr. R. 1469-70].[6]

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complete notes [Tr. R. 1182, 1268]; and that there was substantial digression in Schiro's speech patterns [Tr. R. 1269]. He also noted that Schiro's level of functioning had deteriorated [Tr. R. 1221]. Dr. Crudden, concluded that Schiro was not "insane" [Tr. R. 1219].

Each of the above experts determined that Schiro suffered from sexual dysfunction and two concluded that the closest appropriate diagnosis was sexual sadism [Tr. R. 1228, 1396]. Defense experts, Drs. Frank Osanka and Edward Donnerstein, concluded that Schiro was insane [Tr. R. 1639-40, 1692, 1752-54]. Osanko opined that Schiro suffered from paranoid schizophrenia [Tr. R. 1692]. He interviewed Schiro and his family for over fifty hours [Tr. R. 1683] and reviewed numerous documents, specifically requesting documentation generated prior to the instant offense [Tr. R. 1681, 1690-1].

[5] This testimony included the following: that Schiro began biting his fingernails in grammar school [Tr. R. 1507] and by the time he reached adulthood had chewed off his fingertips due to nervousness [Tr. R. 991, 1472, 1734]; that although Schiro was then residing in a half-way house, two weeks prior to the killing he requested transfer to another facility which provided more intensive counseling [Tr. R. 1031-33]; that he exhibited a decline in occupational functioning [Tr. R. 1080-82] and in personal hygiene [Tr. R. 1471].

[6] The majority of this evidence came from state's witness Mary Lee [Tr. R. 1418-1491]. Lee was Schiro's girlfriend at the time of

The trial court's instructions at the close of the evidence defined the possible mental states relevant to the *mens rea* murder charge [J.A. 22]. The court instructed that "[a] person engages in conduct 'knowingly' if, when he engages in the conduct he is aware of a high probability that he is doing so," and that "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." [J.A. 22].[7]

The case was submitted to the jury with ten (10) possible verdict forms:

1. Guilty as charged on Count I;
2. Guilty as charged on Count II;
3. Guilty as charged on Count III;
4. Guilty of the lesser included offense of voluntary manslaughter;
5. Guilty of the lesser included offense of involuntary manslaughter;
6. Not guilty;
7. Not guilty by reason of insanity;
8. Guilty of Murder, but mentally ill;
9. Guilty of voluntary manslaughter, but mentally ill; and
10. Guilty of involuntary manslaughter, but mentally ill.

[J.A. 37-38]

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the crime [Tr. R. 1419-20]. Lee's testimony is set forth in more detail *infra* at fn. 30 and 32.

[7] At the guilt phase, during both preliminary and final instructions, the court specifically instructed that Schiro could be convicted of mens rea murder if the state proved beyond a reasonable doubt that Schiro knowingly *or* intentionally killed [J.A. 11, 21, 22-23]. The jury was also instructed on the definitions of both mental states [J.A. 22]. The mental state of "intentionally" applied only to *mens rea* murder. The state did not object to these instructions.

During deliberations the jury sent out a request to the court [J.A. 39] which is not contained in the record. In response, and by agreement of the parties, the court reread three instructions to the jury [J.A. 39]:

1. The defense of insanity and the definition of "mental disease or defect" [J.A. 22];
2. The definition of criminal deviate conduct [J.A. 30]; and
3. The verdict of guilty but mentally ill and the definition of "mentally ill." [J.A. 30].

After five hours of deliberation [Tr. R. 107], the jury expressly found Schiro guilty of Count II, felony murder —rape [J.A. 37]. This charge required no *mens rea* as to the killing—the only *mens rea* element was the intent to commit the underlying felony of rape. The jury did not return a verdict on either the murder charge which required an intent to kill (Count I, *mens rea* murder) [J.A. 37], or on Count III (felony murder—criminal deviate conduct) [J.A. 38]. Judgment was entered on the verdicts the day they were rendered [Tr. R. 128, 137].

A few days later, the jury was reassembled to consider whether Schiro should suffer the penalty of death. Under Indiana law, the state may seek the death penalty by alleging, in a document separate from the charge, the existence of one or more statutory aggravating factors. Ind. Code §§ 35-50-2-9(a). In order to prevail on its death request, the state must prove, beyond a reasonable doubt, the existence of each element of at least one statutory aggravating circumstance. Ind. Code § 35-50-2-9 (e)(1). If the state proves at least one aggravating circumstance beyond a reasonable doubt, the jury must then weigh any aggravators found against any mitigators found. Ind. Code § 35-50-2-9(e)(2).

In Schiro's case, the state alleged two aggravating factors: an *intentional* killing in the course of a rape; and

an *intentional* killing in the course of a criminal deviate conduct. See generally Ind. Code § 35-50-2-9(b)(1) [J.A. 6, 7]. Both aggravators required the state to prove beyond a reasonable doubt that Schiro entertained an "intentional" state of mind when he committed the killing. The evidence from the guilt trial was incorporated at the penalty trial; no additional evidence was offered by either party [Tr. R. 262-264].

Three verdict forms were provided to the jury at the close of the penalty trial:

1. A recommendation for the death penalty;
2. A recommendation against the death penalty; and
3. No recommendation.

[J.A. 40-41]

After deliberating for sixty-one minutes [Tr. R. 109], the jury returned a unanimous recommendation against the death penalty [J.A. 40]. The court accepted the jury's penalty trial recommendation and the jury was discharged [Tr. R. 130].

Approximately 18 days later, Schiro stood before the court for sentencing. Within minutes, the considered judgement of twelve members of the community was overridden and Schiro was sentenced to death.[8]

[8] In Indiana, the jury issues a recommendation to the court regarding sentencing. The court then ultimately determines the appropriate sentence. The court must base its sentence on the same standards the jury was required to consider. Ind. Code 35-50-2-9(e). On direct appeal, a majority of the Indiana supreme court refused "to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty." *Schiro v. State*, 451 N.E.2d at 1058. In 1989, the Indiana Supreme Court "develop[ed] a standard appropriate to the separate roles of judge and jury." *Martinez Chavez v. State*, 534 N.E.2d 731, 734 (Ind. 1989). "In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that vitrually no reasonable person could disagree that death was appropriate in light of the offender and his crime." *Id.* at 735.

B. Direct Appeal Proceedings

After briefing was completed, the Indiana Supreme Court found the "original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty." *Schiro v. State*, 451 N.E.2d at 1056. At the state's request, the supreme court remanded the case to the trial court so that it could clarify its reasons for imposing the death penalty. *Id.* The trial court did so on February 22, 1983 [J.A. 45-50]. In the revised findings and conclusions, the trial court again determined that the jury's life recommendation should be overridden and the death sentence imposed. The trial judge found the existence of one aggravating circum-

Although the judge override in Schiro's case was not reviewed under the *Martinez Chavez* standard, Schiro's case was distinguished therein: "[I]n *Schiro*, the trial court had reason to believe that the jury had been tricked into recommending against the death penalty. The defendant had tried to delude the jurors into thinking he was mentally unstable by rocking back and forth [only] in their presence." 534 N.E.2d at 733. However, the jury was well aware that Schiro sometimes rocked and sometimes did not because seven witnesses were asked whether they had previously witnessed Schiro rocking similar to the way he rocked in court. Mary Lee testified that Schiro frequently rocked [Tr. R. 1476]. Richard Egan, the officer who fingerprinted Schiro, stated that he rocked while he was being booked [Tr. R. 993]. Court psychiatrist, Dr. Crudden could not recall whether Schiro rocked during his interview [Tr. R. 1210-11]. Four witnesses testified that they had not previously witnessed Schiro rocking [Tr. R. 966, 1087-88, 1109, 1011]. This evidence was not discussed in the trial court's findings imposing the death sentence or in the state supreme court opinion.

Schiro's case is one of only two cases where the Indiana supreme court has upheld an override. Compare *Minnick v. State*, 544 N.E.2d 471 (Ind. 1989), with *Kennedy v. State*, 578 N.E.2d 633 (Ind. 1991); *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992); and, *Martinez Chavez, supra*. See also, *Thompson v. State*, 492 N.E.2d 264 (Ind. 1986) (reversed on other grounds).

stance: that Schiro "intentionally killed [the decedent] while committing or attempting to commit rape." *Schiro v. State*, 451 N.E.2d at 1058.

A majority of the Indiana Supreme Court affirmed Schiro's conviction and sentence on direct appeal. *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983).

C. Post-Conviction Proceedings:

In Schiro's first post-conviction action he raised two legal issues: (1) whether the trial judge was biased [9] and improperly considered Schiro's behavior during the course of the trial in sentencing him to death; [10] and (2) whether trial counsel rendered constitutionally ineffective assistance of counsel.[11]

In his second state post-conviction petition, Schiro argued that his death sentence stood in violation of the

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[9] A newspaper reporter testified that prior to the return of the guilt phase verdict, the trial judge stated, "we're going to fry the boy" [PCR1 R. 199]. The trial prosecutor's initial recollection of the judge's comment was, "I think the boy is going to fry" [PCR1 R. 185]. After talking with the judge prior to the post-conviction hearing, the prosecutor then recalled that the judge said, "I think the boy is going to die" [PCR1 189]. The trial judge testified that he stated, "soon we'll know whether he'll live or die" [PCR1 R. 171], and that he did not make up his mind until the day of sentencing whether the death penalty would be imposed. The state court concluded that, "[t]he comment made by [the trial judge], in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious." *Schiro v. State*, 479 N.E.2d at 561.

[10] Here Schiro alleged that the trial court improperly considered information not in evidence, specifically the court's belief that Schiro attempted to fool the jury by rocking in their presence, when it overrode the jury's sentencing determination. See fn. 8, *supra* at 10-11.

[11] The hearing court and the state supreme court found counsel was effective. *Schiro v. State*, 479 N.E.2d at 561.

double jeopardy clause of the fifth amendment as well as the fifth amendment's collateral estoppel doctrine. Post-conviction relief was denied by the trial court [J.A. 112-129]. By a 3-2 vote, the Indiana Supreme Court affirmed the denial of post-conviction relief on the merits.[12] In so holding, the court stated:

> The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under I.C.35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing [13] and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to I.C. 35-50-2-9, and the jury determined that the aggravating circumstance existed and that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct.[14] In

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[12] Since the state supreme court ruled on the claim on the merits, there is no bar to federal review. *Harris v. Reed*, 489 U.S. 255, 261 (1989); see also, *Ylst v. Nunnemaker*, 111 S. Ct. 2590, 2593 (1991); *Wainwright v. Witt*, 469 U.S. 412, 431, fn. 11 (1985).

[13] The state court erred when it determined that the jury never confronted the issue of whether the killing was intentional. In fact, the jury was specifically instructed that it could convict Schiro of *mens rea* murder if it found that "when the defendant [committed the killing] he knew the conduct would *or intended* the conduct to cause the death of [the decedent]", (emphasis added) [J.A. 23]. As discussed *infra* at 26-27, a "knowing" state of mind is a lesser state of mind than an "intentional" one.

[14] The state court erred when it notes that the jury determined that the aggravating circumstance existed. In fact, the jury never

> the same stattue, § (9)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made his.

Schiro v. State, 533 N.E.2d at 1208 (Ind. 1989) [emphasis added].

Two dissenting justices contended that Schiro was entitled to a reversal of his death sentence. They noted:

> The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. *Buckner v. State* (1969) 252 Ind. 379, 248 N.E.2d 348, *Smith v. State* (1951) 229 Ind. 546, 99 N.E.2d 417.
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> . . . In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. [citation omitted] The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act.

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made such a finding. The jury did not reach such a finding at the guilt trial and then unanimously recommended *against* the death penalty [J.A. 37, 40]. Under Indiana law, the jury does not issue specific findings when issuing its penalty phase decision. *Bieghler v. State*, 481 N.E.2d 78, 86 (Ind. 1985), cert. den. 475 U.S. 1031 (1986).

> I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

Id. at 1208-1209 (DeBruler, J., dissenting).

Certiorari was denied. *Schiro v. Indiana*, 493 U.S. 910 (1989). Justice Stevens authored an opinion "respecting the denial of certiorari" which discussed the double jeopardy and collateral estoppel claims presented in this brief. Justice Stevens wrote:

> It cannot be disputed that petitioner was placed in jeopardy within the meaning of the Fifth Amendment to the Federal Constitution when the trial on Count I commenced. [citation omitted]. The fact that Indiana may not consider the jury's silence an "acquittal" as a matter of state law surely does not determine the constitutional question whether he could again be placed in jeopardy on the same charge [citation omitted]. Nor does it determine whether the action by the jury—especially when illuminated by its unanimous decision at the penalty hearing—should be given preclusive effect either under principles of double jeopardy in capital cases . . . [citation omitted], or under more general principles of collateral estoppel.

Id. (opinion of Stevens, J., respecting the denial of certiorari).

D. Federal Habeas Corpus Proceedings:

Thereafter, Schiro sought relief on the double jeopardy and collateral estoppel claims in federal habeas corpus proceedings. The federal district court denied relief on these claims finding that the silent verdicts did not constitute an acquittal under state law. *Schiro v. Clark*, 754 F. Supp. at 660. The court of appeals, likewise, concluded that the state court characterization of the silent

verdicts was binding upon the federal court, and was dispositive of the double jeopardy claim:

> In order to assess the effect of the jury's findings, this Court looks to state law. *United States ex rel. Young v. Lane*, 768 F.2d 834, 841 (7th Cir. 1985) . . . Since the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen.

Schiro v. Clark, 963 F.2d at 970 (emphasis in original).

This Court granted certiorari *Schiro v. Clark*, 113 S.Ct. 2330 (1993).

SUMMARY OF THE ARGUMENT

Schiro was charged with three counts of murder for the death of a single person. An essential element of Count I required the state to prove that Schiro "knowingly" killed. Counts II and III required no proof of any intent to kill. Each required the state to prove that Schiro committed a separate felony (rape and criminal deviate conduct, respectively).

Each charged count was submitted to the jury. The jury returned a guilty verdict only on Count II, felony murder—rape. It returned no verdict on either Count I or III. The jury's failures to convict on Counts I and III were implicit acquittals because the jury had the opportunity to convict but did not and because the facts of this case make it clear that the jury intended to acquit Schiro of Counts I and III.

Indiana law requires the state to prove all elements of at least one aggravating circumstance as a predicate for a death sentence. The state advanced two aggravating circumstances at Schiro's penalty trial. Each required the state to prove, beyond a reasonable doubt, that the killing was intentionally committed. Under state law, a

"knowing" state of mind is less than, and a necessary part of, an "intentional" state of mind. Consistent with the implicit acquittals at the guilt trial, the jury returned a recommendation that the death penalty not be imposed. Although at the guilt trial Schiro had been acquitted of the only charged offense which required an intent to kill, the trial court overrode the jury's sentencing recommendation and imposed the death penalty, finding that Schiro intentionally killed during a rape.

This death sentence cannot stand, consistent with the double jeopardy clause, because Schiro was implicitly acquitted at the guilt trial of the same offense which the trial court used as the sole aggravating circumstance to support the sentence.

Schiro's death sentence is also barred by the fifth amendment doctrine of collateral estoppel. The state's burden of proof at the guilt trial is the same as its burden of proof at the penalty trial in Indiana: beyond a reasonable doubt. The material factual dispute at the guilt trial was Schiro's mental state. This dispute was resolved against the state when the jury implicitly acquitted him of Count I, the Count requiring the state to establish that Schiro killed intentionally.

At the penalty trial, the state relied solely upon the same evidence and the same factual contentions which the jury had rejected at the guilt trial, again asking the jury and then the judge to find that the killing was intentionally committed. When the jury declined, the trial judge obliged. Such relitigation of facts once determined in Schiro's favor violates the fifth amendment.

ARGUMENT

ESTABLISHED PRINCIPLES OF DOUBLE JEOPARDY BAR IMPOSITION OF THE DEATH PENALTY BECAUSE SCHIRO WAS ACQUITTED AT THE GUILT TRIAL OF THE ELEMENTS OF THE ONLY APPLICABLE AGGRAVATORS

The issue in this case is whether Schiro's right not to be placed twice in jeopardy was violated when he was sentenced to death on the basis of findings in aggravation that necessarily subsumed the same offense and elements on which he had been acquitted by the jury at the guilt trial. See *Bullington v. Missouri*, 451 U.S. 430 (1980). The jury acquitted Schiro of *mens rea* murder at the guilt trial when it eschewed the state's argument that Schiro knowingly killed, and instead found that the killing was done in the commission of a rape. Despite this judgment, the state asked both the jury and the judge to find Schiro eligible for death and to impose a death sentence claiming he intentionally killed.

Schiro divides this argument into four parts. In part A., Schiro sets forth what determinations must be grounded in state law and what determinations are controlled by the federal double jeopardy clause. Schiro demonstrates that the issue of whether a jury's failure to convict a criminal defendant of a charge submitted to it is the constitutional equivalent of an acquittal is a question of federal law. In part B., Schiro shows why, under federal law, the jury's silent verdicts here amounted to acquittals. He demonstrates that the jury had a full opportunity to convict but did not; and that it intended to acquit and did acquit. In part C., Schiro demonstrates that since the elements of the alleged aggravators were the same as the elements of the acquitted offenses, the double jeopardy clause bars imposition of the death penalty. In part D., he demonstrates that fifth amendment principles of collateral estoppel barred the prosecution

from relitigating as the basis for a death sentence the crucial factual issue of intent to kill that the jury had resolved in Schiro's favor at the guilt trial.

A. The Determination of Whether a Silent Verdict Is an Acquittal for Double Jeopardy Purposes Is a Federal Issue; State Law Is Relevant Only To Determine the Factual Setting Under Which the Claim Arose.

1. *The proper interaction of state and federal law.*

In direct contravention of this Court's precedent, the lower court erroneously determined that Indiana law controlled the determination of whether there was an "implicit acquittal" in Schiro's case.[15] Simply put, the question of whether the facts at bar constitute an implicit acquittal is a federal question which cannot be resolved solely by citing to the state court's legal conclusion.

Double jeopardy questions customarily require an understanding of state law before the federal question can be properly identified and answered. For example, in *Brown v. Ohio*, 432 U.S. 161, 164 (1977), the Court began its analysis by first identifying the elements of the offenses under state law. Once that task was completed, the issue of whether double jeopardy was violated by the state's successive prosecutions for a lesser and greater offense was a federal question and was resolved based upon interpretations of the federal constitution. Likewise, in *Turner v. Arkansas*, 407 U.S. 366 (1972), the Court held the doctrine of collateral estoppel prohibited

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[15] The lower court rejected Schiro's double jeopardy claim, relying upon *United States ex. rel. Young v. Lane, supra*, finding the silent verdicts did not represent acquittals because the state court determined, as a matter of state law, that a silent verdict in a multi-count charge is not an acquittal for double jeopardy purposes. See, *supra* at 16. Unlike the opinion in *Young*, the lower court in Schiro's case did not engage in *any* analysis of whether the state court ruling violated federal double jeopardy rights. *Id.*

the state from trying Turner for robbery after he was acquitted of murder during the course of a robbery. This result was constitutionally required under the collateral estoppel prong of the double jeopardy clause even though state law prohibited a defendant from being jointly tried for murder and any other offense.

To be sure, the states are empowered, within broad limits, to define various criminal offenses, to establish penalties for violations of their laws, and to establish procedures by which disputes are resolved. See generally, *Patterson v. New York*, 432 U.S. 197, 201 (1977). The federal courts are nevertheless bound to determine whether the state procedures violate the federal constitution. State rulings concerning procedures established or the elements of various offenses must necessarily be consulted by the federal courts when ruling upon double jeopardy claims because it is those procedures which form the factual basis for the claimed federal violation. State court expositions of state law are not the end of the inquiry, but rather the beginning.

In a case analogous to Schiro's, the state court held that a ruling on a demurrer was not an acquittal for double jeopardy purposes. *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). There, the trial court sustained a defense demurrer at the close of the state's case. The state then sought to appeal that ruling. The state supreme court held that the ruling on the demurrer was not the functional equivalent of an acquittal because a ruling on the demurrer was a legal question that did not resolve facts in the defendant's favor. Thus, the state supreme court held that the prosecution could lawfully appeal the trial court's ruling.

This Court reversed, holding that the granting of a demurrer is, under fedral double jeopardy principles, an acquittal that would operate to bar the state's appeal of that ruling. In so holding, this Court noted:

> We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as "the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause]," [citation omitted], so too the Pennsylvania Supreme Court's characterization, *as a matter of double jeopardy law*, of an order granting a demurrer is *not* binding on us.

Id. at 144, fn. 5 (emphasis added), see also, *Ohio v. Johnson*, 467 U.S. 493 (1984) (state court ruling that guilty pleas to less serious offenses in multi-count indictment barred prosecution on more serious counts on double jeopardy grounds reversed by this Court).[16]

If the determination of what constitutes an acquittal, and hence a violation of the double jeopardy clause, were truly a matter of state law which the federal courts were required to accept, this Court would have been required

[16] Cases such as *Swisher v. Brady*, 438 U.S. 204 (1978) and *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) are not contrary. In each, this Court consulted state law to determine the parameters of the statutes which formed the factual basis of the claimed double jeopardy violations.

This Court also accepted the state court's description of the various state procedures involved. However, this Court did not accept the state court's resolution of the legal claim *carte blanche*. Rather, this Court applied the facts, i.e. the particular state procedures at issue, as found by the state courts, and applied federal double jeopardy principles to those facts to determine whether a valid double jeopardy claim was presented.

The Indiana scheme at issue in Schiro's case is vastly different than the statutory schemes confronted by this Court in *Lydon* and *Swisher*. In each of those cases, this Court found there was no acquittal because the fact finders in those cases did not have authority (under the state statutes) to enter binding judgments. Thus, in *Lydon* and *Swisher* jeopardy did not end with the entry of findings by the initial fact finders. In *Schiro* there is no state statute or rule that establishes that jeopardy ends at any time other than when the court accepts the jury's verdict.

to adopt the state court analysis in *Smalis* and *Johnson*. Rather, the issue of whether the double jeopardy clause has been violated is a federal issue, which must be resolved by the federal courts by looking to federal law. State law is consulted only to the extent that it bears on the facts of the claim.

As Schiro will show in part B, below, the federal question is controlled by settled precedents of this Court, including *Price v. Georgia*, 398 U.S. 323 (1970). *Price*, like *Johnson*, *supra*, and such cases as *Illinois v. Vitale*, 447 U.S. 410 (1980), would make no sense if state law were controlling with regard to the fifth and fourteenth amendment consequences of a jury's verdict in a state criminal trial.[17] For in *Price*, the Georgia courts had unequivocally held that as a matter of Georgia law, the manslaughter verdict did not have the effect of barring retrial for murder following an appellate reversal of the manslaughter conviction for trial error. The Court, nevertheless found that the Georgia rule violated Price's federal constitutional right not to be placed twice in jeopardy.[18]

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[17] In *Vitale*, the Illinois Supreme Court had applied federal constitutional double jeopardy principles atop state law and found Vitale's second prosecution was barred by the first. If the federal issue had been governed by the state law premises in the Illinois Supreme Court's analysis, the Court would have been required to affirm. Instead, the Court reversed, distinguishing those issues governed by state and federal law. While the Illinois Supreme Court was free to construe its statutes in any way it chose, the federal constitutional effects of that were controlled by federal analysis.

[18] This Court's opinion in *Cichos v. Indiana*, 385 U.S. 76 (1976) is not contrary. What was decisive in *Cichos* was this Court's acceptance of the then state-law practice of instructing the jury to return a verdict on only one of two alternative charges. It was not the Indiana Supreme Court's decision regarding the effect of the jury's verdict, but rather, its enunciation of the rules of state procedure bearing on the proper interpretation of the verdict that controlled the outcome in that case. Cichos was tried when juries

In Schiro's case the federal court below mistakenly held itself bound by the state supreme court's legal conclusion that the silent verdicts were not acquittals for federal double jeopardy purposes. The consequences to be drawn from the silent verdicts is a federal issue which must be resolved through application of federal double jeopardy principles.[19]

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in Indiana had sentencing authority in non-capital cases. The two charges at issues defined the same crime but provided different penalties. Thus, the jury's silence on one could not be construed as an acquittal because the elements of each were the same.

[19] Even if state law controlled the determination of whether the silent verdicts constituted acquittals, Schiro would nonetheless be entitled to relief. The state court has, since at least 1844, consistently held "in interpreting [the Indiana] Constitution" that a silent verdict amounts to an acquittal when the jury returns at least one verdict in a multi-count charge. *Weinzorpflin v. State*, 7 Blackf. 186, 194 (Ind. 1844); *Anderson v. State*, 214 N.E.2d 172 (Ind. 1966) (where jury returned verdict finding defendant guilty of inflicting a wound while attempting to commit a robbery and was silent as to charge alleging assault and battery with intent to commit a robbery, the silent verdict amounted to a finding of not guilty); See also *Buckner v. State*, 253 Ind. 379, 248 N.E.2d 348, 351 (1969) ("Silence of the court on Count I is equivalent to a verdict of acquittal."); *Smith v. State*, 229 Ind. 546, 99 N.E.2d 417, 418 (1951) (same); *Dawson v. State*, 65 Ind. 442, 443-44 (1879) ("[N]o express finding was had upon second count. This was a legal acquittal of the larceny, and leaves the case before us the same as if the second count of the indictment was not in the record."); *Bonnell v. State*, 64 Ind. 498, 499 (1878) ("[T]he verdict of the jury was entirely silent as to the second count of the indictment. This silence of the verdict was equivalent to an express verdict of not guilt as to the second count of the indictment."); *Short v. State*, 63 Ind. 376 (1878) (same); *Bittings v. State*, 56 Ind. 101 (1877) (same). See also, *Tinker v. State*, 549 N.E.2d 1065 (Ind. App. 1990) (same). See discussion of the state court's opinion in *Cichos v. State*, 208 N.E.2d 685 (Ind. 1965), *supra* at 22-23, fn. 18.

The 3-member majority, in *Schiro*, did not overrule prior law; it cited nothing for the proposition that the silent verdicts did not constitute implicit acquittals. This "arbitrary disregard" for

2. *State law relevant to the federal analysis.*

a. *Relevant state law: when jeopardy begins and ends.*

There is no peculiar state statute or rule in Indiana that this Court must analyze to determine the double jeopardy issue presented.[20] Indiana law is consistent with traditional federal principles of double jeopardy.

State law, like federal law,[21] provides that jeopardy attaches when the jury is sworn. *Tyson v. State*, 543 N.E.2d 415 (Ind. App. 1989); Ind. Code § 35-41-4-3 (2). State law provides that jeopardy ends when the verdict is returned and accepted by the court.[22] *Gilmore v. State*, 98 N.E.2d 677, 680, fn. 1 (Ind. 1951); *West v. State*, 92 N.E.2d 852, 855 (Ind. 1950).

If the trial court becomes aware of a defect in the verdict before it is accepted and before the guilt trial jury is discharged, the court may resubmit the case to the jury to correct the defect. *Patton v. State*, 275 N.E. 2d 794 (Ind. 1971); *Langley v. State*, 267 N.E.2d 538

Schiro's rights alone violates federal due process. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980), see also, *James v. Kentucky*, 466 U.S. 341 (1984).

[20] The override provisions of the state death penalty statute are not controlling in this case because Schiro's acquittal occurred at the conclusion of the *guilt* trial.

[21] *Crist v. Bretz*, 437 U.S. 28 (1978).

[22] In Indiana, jeopardy may end prior to verdict if the court discharges a jury without manifest necessity. *Armontrout v. State*, 15 N.E.2d 363 (Ind. 1938) (where jury discharged due to prejudicial remarks made by defense counsel, there was no manifest necessity and state double jeopardy clause barred retrial); *State v. Wamire*, 16 Ind. 357 (1861) ("If the Court, without the consent of the defendant, discharged the jury to whom his cause has been submitted, before verdict, no imperious necessity rendering such discharge necessary, it works as an acquittal of the defendant . . ."); *Miller v. State*, 8 Ind. 325 (1856) ("The discharge of the jury must result from necessity, a necessity determined by law, or it will release the prisoner.").

(Ind. 1971); *Maynard v. State*, 508 N.E.2d 1346 (Ind. App. 1987); *King v. State*, 310 N.E.2d 77 (Ind. App. 1974); see also, *Martin v. State*, 154 N.E.2d 714 (Ind. 1958) (ambiguous verdict must be construed in favor of the accused).

As a matter of Indiana law, once a verdict is reached and accepted by the trial court, further factual determinations are prohibited. The entry of the verdict creates a bright line between the guilt trial and all proceedings thereafter. *Tinker v. State*, 549 N.E.2d 1065, 1067 (Ind. App. 1990), trans. den. (defendant charged with robbery, a class B felony, but found guilty of robbery, class C; court's order granting state's pre-sentencing request for additional fact findings supporting robbery as a class B felony and subsequent sentence on the class B felony held improper because "any amendment of the fact finding determination would violate [Tinker's] protection against double jeopardy.").

Once the jury returned its verdict of guilt on Count II, the court accepted that verdict and entered judgment [Tr. R. 128, 137; J.A. 42]. Jeopardy ended with this act.

b. *Relevant state law: Elements of Offenses and Definitions of those Elements.*

Schiro was charged with three counts at the guilt trial. Each of these counts contained elements that the others did not; the charged offenses were not the "same": [23]

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[23] *Mens rea* murder and felony murder are separate offenses for double jeopardy purposes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("The test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."). See also, *United States v. Dixon*, —— S.Ct. —— (1993).

	Count I, Mens Rea Murder	Count II, felony murder-rape	Count III, felony murder-deviate conduct
Mental State as to Killing	Knowingly	NONE	NONE
Killing Required	Kills another person	Kills another person	Kills another person
Additional Elements	NONE	While committing or attempting to commit rape	While committing or attempting to commit deviate conduct

The Indiana Supreme Court recognized that "[t]he crimes of murder and felony murder each contain elements different from the other but are equal in rank." *Schiro v. State*, 533 N.E.2d 1201, 1208. "[T]he state, in attempting to prove a felony-murder charge, need only establish that the defendant intended to commit the underlying felony; no evidence of an intent to kill need be introduced." *Head v. State*, 443 N.E.2d 44, 50 (Ind. 1982); citing, *Vertner v. State*, 400 N.E.2d 134 (Ind. 1980); *Cade v. State*, 264 Ind. 569, 348 N.E.2d 394 (1976); and *Wilson v. State*, 263 Ind. 469, 333 N.E.2d 755 (1975).

The applicable mental states are defined by Indiana law as follows:

> 1. "*Intentionally*": "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so."
>
> 2. "*Knowingly*": "[a] person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so."

Ind. Code § 35-41-2-2(a)-(b).

Under Indiana law, an "intentional" state of mind requires greater proof than a "knowing" one. *Case v. State*,

458 N.E.2d 223, 225 (Ind. 1984). In *Trevino v. State*, 428 N.E.2d 263, 267 (Ind. App. 1981), the court stated: "The highest degree of culpability is 'intentionally.' If conduct is engaged in 'intentionally,' it necessarily follows that it must be engaged in 'knowingly' also."

At the penalty trial, the state alleged two aggravating circumstances, both of which required proof that the killing was intentional [J.A. 6-7]. For purposes of capital sentencing, the definition of "intentionally" is the same as that set forth above. Ind. Code § 35-50-2-9(b)(1).[24]

c. *The relevance of the applicable state law.*

When the jury returned its single "guilty" verdict, there was no procedure available under Indiana law for the state to institute further fact finding proceedings on the guilt trial charges. *Tinker, supra.* That is plain, and plainly relevant. What is irrelevant and, respectfully, simply wrong, is the lower court's reliance upon the Indiana supreme court's conclusion that the silent verdicts were not acquittals.

B. The Silent Verdicts at the Guilt Trial Constitute an Acquittal Because the Jury Was Given an Opportunity To Convict Schiro and Did Not, and Because the Jury Intended To Acquit Schiro of the Charges Upon Which the Jury Was Silent.

The jury's failure to return a guilty verdict on Counts I and III represents an acquittal of those charges. Since

[24] Given the fact that the jury was instructed on both *mens rea* elements with respect to the count I charge, discussed *supra* at 8, fn. 7, the prosecution amended that charge. Under state law, the prosecution effectively amends the charge when, as here, different elements or degrees of offenses are provided to the jury without objection. *Rodriguez v. State*, 385 N.E.2d 1208 (Ind. App. 1979) (trial court's act of instructing the jury on the offense of only simple robbery when government had charged greater offense constituted an amendment of the charge).

the jury had an opportunity to convict Schiro on each count and was discharged without doing so, the silent verdicts are the constitutional equivalent of acquittals under established double jeopardy law. Moreover, review of the evidence presented, the verdict forms submitted, the responses to the jury's questions during deliberations, and the jury's penalty trial verdict, establish that the jury intended to acquit Schiro of those offenses.

This Court has previously confronted the issue of whether a jury's silence on one count of a multi-count charge represents an acquittal for double jeopardy purposes. In *Green v. United States*, 355 U.S. 184 (1957), the defendant was charged with first degree murder. The jury convicted him of the lesesr offense of second degree murder, but was silent as to the first degree murder charge. Green's conviction of second degree murder was reversed on appeal. On retrial Green was again tried for first degree murder. At the second trial he was convicted of the greater charge and he appealed arguing that his retrial for first degree murder was barred by the double jeopardy clause of the fifth amendment.

This Court concluded that Green's retrial for first degree murder violated the fifth amendment. This result rested on two grounds. First, the initial jury intended to acquit Green of first degree murder. Second, the jury was given the opportunity to convict Green of first degree murder and did not.

> [T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.

Id. at 191, 78 S. Ct. at 225 (emphasis added).

Likewise, in *Price v. Georgia*, 398 U.S. 323 (1970), this Court held that when the jury is silent on the greater offense and convicts the defendant of the lesser offense, the silent veridct is an acquittal. Thus, retrial on the greater offense following reversal on appeal violates the double jeopardy clause. *Price* reiterated the dual basis for the holding in *Green*:

> First, [the *Green* Court] considered the first jury's verdict of guilty on the second-degree murder charge to be an "implicit acquittal" on the charge of first degree murder. Second, and more broadly, the Court reasoned that petitioner's jeopardy on the greater charge had ended when the first jury "was given a full opportunity to return a verdict" on that charge and instead reached a verdict on the lesser charge.

Price, supra at 328-29.

Under either prong of the *Green/Price* analysis, there was an acquittal at the close of Schiro's guilt trial.

1. ***Schiro's jury was given the opportunity to convict him of the counts on which they remained silent and their falure to do so is the constitutional equivalent of an acquittal under established principles of double jeopardy law.***

Schiro was placed in jeopardy at the time his jury was sworn. *Crist v. Bretz, supra*; *Tyson v. State, supra.* "[T]he conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." *United States v. Jorn*, 400 U.S. 470, 480 (1971). One of the "principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury impaneled to try him. . . ." *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982).

Thus, as noted above, one of the reasons for the holding in *Green* that the silent verdict represented an acquittal was that the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." 355 U.S. at 191. This court further noted that "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial." *Id.* at 188. So long as jeopardy has attached, if the trial is terminated for any reason not constituting a manifest necessity, an acquittal results and retrial will be barred. *Id.*

In Schiro's case, there was no unforeseeable circumstance or manifest necessity which prevented the jury from impartially considering Schiro's guilt on all charged counts.[25] Because Schiro's jury was provided with a clear avenue to convict Schiro on each charged count—it was provided with a separate "guilty" form for each—his jury had an unimpeded opportunity to convict. It did not. Therefore, Schiro was acquitted of Count I, *mens rea* murder, and Count III, felony murder-criminal deviate conduct.

[25] When the trial judge terminates a trial prior to verdict the double jeopardy clause bars retrial unless the termination was occasioned by "manifest necessary." The manifest necessity standard "provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgment.'" *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (citation omitted). See also *Illinois v. Sommerville*, 410 U.S. 458 (1973); *Downum v. United States*, 372 U.S. 734, 736 (1963); *Lovato v. New Mexico*, 242 U.S. 199 (1916); *Thompson v. United States*, 155 U.S. 271 (1894). In each of these cases the issue involved whether the circumstances preventing the jury from considering the charge was serious enough to constitute a manifest necessity. In Schiro's case, the charges not only could have been submitted to the jury, but they in fact were submitted. See *Ortiz v. District of Las Animas*, 626 P.2d 642 (Colo. 1981) (where case submitted to jury on multiple counts and jury did not return a verdict on some of those counts, there was no manifest necessity and retrial was barred).

2. *Schiro's jury intended to acquit him of the offenses for which they returned no verdict.*

The jury's decision to acquit Schiro of Counts I and III was both rational and reasonable. Schiro raised two defenses to the charges: a special plea of not responsible by reason of insanity and a general "denial" [Tr. R. 95]. Under Indiana law, this plea permits the jury to consider, in addition to the insanity issue, whether the defendant was able to form the requisite intent due to a mental impairment and whether the defendant is guilty but mentally ill of the crimes charged.[26]

An examination of the facts established at trial, the framework provided by the verdict forms, the questions sent to the court during guilt trial deliberations, and the jury's penalty trial determination, reveals that the central disputed issue was whether Schiro knowingly killed or whether, instead, the victim died at the hands of a "sick, rejected and tormented creature" [27] who was incapable of forming the intent to kill.

[26] Indiana, unlike other states, does not recognize a separate legal defense of diminished capacity. *Cardine v. State*, 475 N.E.2d 696 (Ind. 1985). Nor does Indiana recognize "degrees of insanity". *Id.* (citations omitted). However, mental health evidence may be admitted and considered to negate the specific intent where, as here, the defense of insanity is raised. *Id.*, see also, *Brown v. State*, 448 N.E.2d 10, 19 (Ind. 1983).

Other areas in Indiana law similarly recognize that mental state evidence, standing alone, may serve as a defense to the extent it negates the requisite *mens rea* element. Ind. Code § 35-41-3-7 (mistake of fact is a defense to the extent it "negates the culpability required for commission of the offense."). Likewise, intoxication is a defense to the extent that it negates *mens rea*. *Street v. State*, 567 N.E.2d 102, 104 (Ind. 1991).

[27] *Schiro v. State*, 451 N.E.2d at 1070 (Prentice, dissenting).

a. *The facts established at trial demonstrate the jury's decision to acquit Schiro of* mens rea *murder was rational and well within the evidence.*

The jury was inundated with evidence regarding Schiro's mental status, and consequently, whether he was capable of forming the intent to kill. Because of this evidence, the trial prosecutor was fearful that the state would not obtain a conviction. He testified at the first post-conviction hearing:

> [T]here were two times that I felt in great jeopardy. The first one was when the jury was considering, uh, the question of guilt or innocence, because I felt the question of the returning of a verdict had been, of guilty as charged, was in serious danger because of [defense counsel's] masterful portrayal of the Defendant as a sick, wounded bird in need of help, rather that (sic) a vicious criminal.

[PCR2.R. 194].

Preliminary instructions regarding the state's burden on the *mens rea* charge [J.A. 11, 15]; the definition of insanity [J.A. 15]; and the respective burdens of proof [J.A. 15], set the stage for the trial evidence.[28]

As in other trials involving mental health-related defenses, Schiro's jury heard testimony from mental health experts. However, unlike many trials where the defendant's mental health is in issue, Schiro's jury actually heard *some* agreement among the five experts. The dispute among the experts concerned *not* whether Schiro suffered from a mental disorder, but whether his mental disorder constituted legal insanity.

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[28] The jury received even more extensive final instructions on this and related topics. Seventeen (17) of a total of thirty-eight (38), final instructions pertained to the state's burden on the mens rea *murder charge and the mental health defenses. See fn. 41, infra* at 43-44.

Court-appointed expert, Dr. Charles Crudden, told the jury, that Schiro had a mental disorder [Tr. R. 1207, 1209]. Among other things, Dr. Crudden discussed Schiro's blunted affect [Tr. R. 1219]; his rapid and digression-ridden speech patterns [Tr. R. 1268-9]; and his sexual dysfunction [Tr. R. 1207-08, 1228-29]. Court witness Dr. Woods described Schiro's feelings as rather "primitive"—similar to an infant's feelings about hurting or being hurt—and concluded that Schiro was mentally ill [Tr. R. 1412, 1415]. Similarly, state's witness, Dr. David Crane, found that Schiro had "emotional difficulties" of "long standing duration" and concluded that these problems were a significant part of his make-up [Tr. R. 1871, 1877]. However, each of these experts concluded that Schiro was sane.

Defense experts, Drs. Frank Osanka and Edward Donnerstein, were the only experts who determined that Schiro was legally insane [Tr. R. 1639-40, 1691-92]. Dr. Osanka was the only witness who testified that Scihro was both legally and medically insane; he determined that Schiro suffered from schizophrenia [Tr. R. 1692].

From extensive interviews with Schiro and his family, Dr. Osanka determined that Schiro's belief system was greatly influenced by his exposure to pornographic films beginning around age 6½ [Tr. R. 1710]. Because this influence occurred at such a young age, Schiro was unable to integrate this information into his behavior in a healthy manner [Tr. R. 1719]. As such, what "he did in secret, is that he integrated his own definition of sexuality and right and wrong about sex for that matter" [Tr. R. 1718]. Thus, Schiro never understood, as others do, the difference between healthy and violent sexual relations. Dr. Osanka agreed with Drs. Crudden and Woods that Schiro met the definition of sexual sadism [Tr. R. 1721], but concluded that diagnosis alone did not adequately define the complexity of Schiro's mental disability [Tr. R. 1781-83].

Had the jury determined that Schiro suffered from schizophrenia, it was not obliged to find that he was not guilty by reason of insanity. Drs. Woods and Crane testified that the "legal" definition of "insanity" was not the same as the "medical" (or "psychiatric") definition of insanity [Tr. R. 1408, 1871-72].[29] The prosecutor asked Drs. Woods, Crudden and Crane if, assuming a person suffered from schizophrenia, that disorder necessarily amounted to "legal" insanity [Tr. R. 1227, 1409, 1884]. All replied that it did not [Tr. R. 1227, 1409, 1884]. At the state's request, an instruction was given which informed the jury that "medical" insanity was not the same as "legal" insanity [J.A. 28]. The jury was also instructed that the testimony of lay witnesses could be considered in determining Schiro's mental state [J.A. 28]. As set forth in fn. 5, *supra* at 7, the jury heard from lay witnesses regarding Schiro's bizarre behavior.

The only witness who testified from personal knowledge regarding Schiro's upbringing was his adopted father, Thomas Schiro, Sr. [Tr. R. 1502 et seq.]. The jury heard that Schiro's parents had taken him to several pediatricians and psychiatrists, and had otherwise sought assistance for him, from the time he was three years old until he was twenty [Tr. R. 1505, 1507, 1508, 1509, 1512, 1513, 1518, 1520]. The jury also heard that Schiro's adopted parents tried to have him placed in a mental institution [Tr. R. 1516-18].

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[29] Dr. Crane testified that "there is a difference between being insane medically or psychiatrically and being insane legally." [Tr. R. 1871]. Specifically, "an individual could commit an act and qualify within the legal definition of legal insanity. A person who may be full blown crazy, crazy could in fact engage in an activity that was clearly legally sane. He could be spaced out and still understand rightfulness and wrongfulness of conduct and be crazy and still realize and control his conduct to the requirements of the law so . . . the law specifically, I think is worded in such a way that both normal and abnormal could be disqualified regardless of their emotional difficulties." [Tr. R. 1871-72].

State's witness Mary Lee was the only other lay witness who had spent a substantial amount of time with Schiro on a daily basis. Lee, who had lived with Schiro for approximately 2 years, described Schiro's sudden and unexplained mood swings and outbursts [Tr. R. 1483]. She testified that he had no control over his actions and that he hated doing some of the things he did [Tr. R. 1480-1481]; she knew this because he would constantly say "why do I do these things . . . help me stop . . . what can I do to quit this . . . I don't want to do this anymore." [Tr. R. 1481].[30]

If, as the prosecuting attorney feared, the jury found that Schiro's mind was sick, it had at least three options: (1) it could find Schiro not guilty by reason of (legal) insanity; (2) it could determine that Schiro was guilty but mentally ill; or (3) it could acquit Schiro of the *mens rea* murder because he was unable to form the

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[30] Lee also testified about Schiro's strange sexual patterns [Tr. R. 1443, 1445, 1447-50, 1458-61]. She also stated that Schiro had a relationship with a mannequin in a local department store window; he would become upset when the mannequin's clothes were changed [Tr. R. 1469-70]. Lee further testified that: Schiro could not manage to stand or sit still and always bobbed back and forth [Tr. R. 1476]; he behaved as if he believed people were watching him or were hiding in the vicinity [Tr. R. 1476]; he was unable to open up to people and believed that people only acted like they were your friends [Tr. R. 1474]; he had no friends [Tr. R. 1475]; he was addicted to pornography [Tr. R. 1479]; in December of 1979 and January of 1980 he refused to take a bath for a month and wore the same clothes for that same period refusing to permit Lee to wash them [Tr. R. 1471-72]; he would require that she refer to her son as "our son" even though he was not the child's biological father [Tr. R. 1471]; he would bite his fingertips until they bled resulting in their permanent disfigurement [Tr. R. 1472]; he was subject to sudden mood changes [Tr. R. 1463]; he once chased her and appeared as if he was possessed [Tr. R. 1465-66]; and he would do violent things and then be remorseful [Tr. R. 1466, 1480-81]. Lee concluded that Schiro was aware of what other people thought was right and wrong but that "inside of himself it didn't make any sense" [Tr. R. 1478] and that he was very sick [Tr. R. 1481].

requisite intent to kill. The plethora of evidence presented on Schiro's mental state shows that the jury had both a rational and sensible reason to determine that Schiro was incapable of forming the specific intent to kill. The prosecutor's observations demonstrate that it was objectively reasonable. It expressed that conclusion in the only way it could—it returned a silent verdict on Count I.[31]

b. ***Contrast between verdict forms and possible verdicts.***

The jury received a single "not guilty" form for the three murder counts, but they received separate verdict forms for "guilty" on each charged count. A comparison of the *verdict forms* submitted and the *possible verdicts* demonstrates the way in which the verdict forms required the jury to express an acquittal on some of the counts by resort to silent verdicts.

Because there were no individual "not guilty" verdict forms for each count, the framework placed the jury in a position where it was unable to rely solely on the forms to express any decision other than guilty of all three counts, or not guilty of all three counts. For example, if the jurors concluded that Schiro was guilty of the two felony murder counts, but not guilty of the *mens rea* murder count, the jury would have had no verdict form to express the *mens rea* murder acquittal. The only way for the jury to express this conclusion would have been to return the two "guilty" forms on the felony murder counts and to remain silent on the *mens rea* murder charge. The sole "not guilty" form they were given could only be used to acquit of *all* charges.

Given the special plea of not guilty by reason of insanity, and the two additional options that stemmed from

[31] The jury also had a rational and sensible basis upon which to acquit Schiro on Count III. See footnote 32, *infra* at 37.

it, had the jury determined that Schiro was "insane" or "guilty but mentally ill" at the time of the crime, they would have properly returned the respective available verdict form. Conversely, had the jury determined that Schiro was incapable of forming the specific intent to kill required in Count I, the framework provided no option to explicitly convey this decision; resort to silent verdicts would have been necessary.

The jury found Schiro guilty of only felony murder—rape. It is here that the jury's silence on Count III becomes indicative. The instructions provided to the jury on Count III informed them that in order to find Schiro guilty of that count, they had to determine that Schiro killed "*while* . . . committing criminal deviate conduct." [J.A. 21] (emphasis added). No further instruction on this element was provided. As to Count II, the defense was careful to point out, through all available witnesses, that the act of criminal deviate conduct occurred *after* death.[32]

[32] The jury's acquittal of felony murder—criminal deviate conduct was likewise certainly dictated by the evidence presented at trial and the instructions given regarding the elements of that offense. The state charged that Schiro killed "while" committing criminal deviate conduct [J.A. 5]. The jury was instructed that the state had to prove the killing occurred "while" the defendant was committing or attempting to commit criminal deviate conduct [J.A. 11, 21]. The verdict form submitted on this count contained the same language requiring a nexus between the killing and the criminal deviate conduct.

Criminal deviate conduct, as charged by the state, requires proof of penetration of the sex organ by an object [J.A. 5]. The pathologist testified that some of the bruising to the decedent could have occurred post-mortem [Tr. R. 643-46]. Although the state did introduce a plastic phallus, the only evidence offered to establish that the plastic phallus was used to penetrate the decedent established that this act occurred after death [Tr. R. 1739].

Mary Lee was the only lay witness with whom Schiro discussed the entire events of the crime. On cross-examination, Lee testified

Given the single "not guilty" verdict form that covered all three counts, the only way for the jury to demonstrate that it found Schiro guilty of Count II, and not guilty of Counts I and III, was to return the Count II verdict form alone.[33] Reasonable jurors would assume if they returned the "not guilty" form (because of their determination on Counts I and III) that such action would be interpreted to mean they found Schiro both guilty and not guilty of Count II. The jury implicitly acquitted on Counts I and III.

c. *Jury questions.*

In response to the jury's request during guilt trial deliberations, and by agreement of the parties, the court reread three instructions to the jury [Tr. R. 128]. Those instructions concerned the following matters of law: 1) the defense of insanity and the definition of "mental disease or defect" [J.A. 22], 2) the definition of criminal deviate conduct [J.A. 30], and 3) the verdict of guilty but mentally ill and the definition of "mentally ill." [J.A. 30]. The request for additional guidance indi-

that Schiro confessed to her that the act of criminal deviate conduct occurred after death [Tr. R. 1490-1491]. Dr. Osanka similarly testified [Tr. R. 1738-39].

From this evidence, the charge, the instructions, and the verdict forms the jury likely concluded that the state failed to sustain their burden of proving beyond a reasonable doubt that the killing occurred "while" the defendant was committing criminal deviate conduct.

The jury evidenced its conclusion that Schiro committed the killing when it convicted on Count II, felony murder-rape. Thus, the jury must have concluded that the state did not prove beyond a reasonable doubt that Schiro committed the underlying offense of killing while committing criminal deviate conduct.

[33] The jury was told that "the court is submitting to you forms of possible verdicts you may return in this case." [J.A. 27]. The jury was *not* instructed that it could, if it so chose, write its own verdict forms.

cates, at a minimum, that the jury was considering the mental health evidence and the charges contained in Count I, *mens rea* murder, and Count III, felony murder —criminal deviate conduct.

d. *Penalty trial verdict.*

The jury's penalty trial verdict illuminates its guilt trial verdicts. The jury was given three sentencing options: a recommendation of death; a recommendation against death; or no recommendation. After sixty-one minutes [Tr. R. 109], the jury unanimously recommended against the death penalty [J.A. 40].

This recommendation, and the speed with which it was returned, suggests strongly that the jury, having previously rejected the state's proof on *mens rea* murder, viewed the killing as the byproduct of the rape and Schiro's sexual dysfunction and rejected the notion that the killing was intentionally committed.[34]

C. The Guilt Trial Acquittals Barred Imposition of the Death Sentence.

In order to properly sentence Schiro to death on the charged aggravating factors, and to override the jury's recommendation for life, the trial judge had to determine that Schiro "intentionally" killed.[35] Such a finding was

[34] Having previously rejected the state's proof on felony murder-criminal deviate conduct, the jury likewise rejected the Count IIIA aggravator (intentional murder during criminal deviate conduct).

[35] As discussed *supra*, at 26-27, under Indiana law an "intentional" state of mind is the highest level of intent in the criminal code and a "knowing" state of mind is a "lesser included" element of an "intentional" state of mind. *Case v. State*, 458 N.E.2d 223, 225 (Ind. 1984); *Trevino v. State*, 428 N.E.2d 263, 267 (Ind. App. 1981); Ind. Code § 35-42-2-2(a)-(c). See also, *State v. Willis*, 552 N.E.2d 512, 516 (Ind. App. 1990).

Conviction of a lesser included offense bars trial for the greater if all facts for the greater have occurred or could have been dis-

unlawful because Schiro had been acquitted at the guilt trial of *mens rea* murder. Schiro could be lawfully sentenced to death only if the state proved beyond a reasonable doubt that the killing was "intentional" and committed during the course of or during the attempt to commit rape or criminal deviate conduct. Ind. Code 35-50-2-9(b)(1). Schiro's jury acquitted him of *mens rea* murder at the guilt trial; yet, in sentencing Schiro to death, the trial court found the existence of a single aggravating factor—that Schiro *intentionally* killed during the course of a rape. *Schiro v. State*, 451 N.E.2d 1047, 1058 (Ind. 1983). This act renders Schiro's death sentence violative of the double jeopardy clause of the fifth amendment because the state is prohibited from attempting to prove at sentencing that which they failed to prove in the guilt trial; specifically, that Schiro intended to kill.[36]

D. Established Principles of Collateral Estoppel Bar Imposition of the Death Penalty Because the Jury Resolved Facts in the Guilt Trial Adversely to the State and These Facts Were a Condition Precedent to Lawful Imposition of the Death Penalty.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court recognized that the doctrine of collateral estoppel is embodied in the double jeopardy clause of the fifth amendment made applicable to the states through the fourteenth amendment.

Ashe was charged with six counts of robbery and one count of car theft arising from a robbery of six persons playing poker. Ashe initially went to trial for the robbery

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covered by due diligence. *Brown v. Ohio*, 432 U.S. 161 (1977). The jury's silence on the greater offense when coupled with a conviction for the lesser offense opeartes as an acquittal of the greater. *Green v. United States, supra.*

[36] It is relevant to note that the trial judge did not find the other charged aggravator, specifically that: Schiro intentionally killed during the course of criminal deviate conduct [J.A. 45-50].

of Knight, one of the poker players. The proof that a robbery had occurred was "unassailable." *Id.* at 438. The sole issue at trial was whether Ashe had committed the robbery. He was found not guilty. Shortly thereafter Ashe was brought to trial again for the robbery of another of the poker players. The state buttressed its identification evidence at the second trial and Ashe was convicted.

The doctrine of collateral estoppel stands for the proposition that "when an ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. This Court noted that when a previous judgment of acquittal is based upon a general verdict, application of collateral estoppel principles requires the Court to " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at 444 (citation omitted).

The Court looked to the evidence, the charge, and the jury instructions at Ashe's first trial and concluded that the doctrine of collateral estoppel barred Ashe's trial for the robbery of any of the other poker players. This Court noted:

> Once the jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon

the issue of whether the petitioner was one of the robbers.

Id. at 446.

An examination of the evidence, pleadings and instructions in Schiro's case shows that he is entitled to relief under *Ashe*. See also *Bullington v. Missouri*, 451 U.S. 430 (1981).

1. What material facts were in dispute at Schiro's trial?

a. *Trial evidence.*

As set forth fully *supra* at 32-36, evidence of Schiro's mental state pervaded the guilt trial. Thus, the "unassailable" facts were that a killing and a rape occurred and that Schiro committed those acts. *Ashe*. What was disputed, and relevant to the *Ashe* inquiry, was Schiro's mental state.

b. *Pleadings.*

The pre-trial pleadings demonstrate that intent was a material disputed fact. Seven of ten motions filed by the defense centered on Schiro's mental state: (1) "Motion to Have the Defendant Placed Under Observation" [Tr. R. 31];[37] (2) "Motion for Additional Psychiatric Appointment" [Tr. R. 36]; (3) "Notice of Intent to Interpose the Defense of Insanity" [Tr. R. 55]; (4) "Motion to Have the Defendant Placed Under Institutional Observation or in the Alternative, to be Incarcerated in a Facility Other Than the Vanderburgh County Jail" [Tr.

[37] In this motion, counsel alleged that Schiro was in need of "isolation, observation and treatment by psychiatric authorities to prevent the defendant from bringing harm to himself" [Tr. R. 32]. The trial court denied this motion, but did order, at Schiro's request, mental health professionals to evaluate Schiro for sanity and competency [Tr. R. 34].

R. 67];[38] (5) "Motion for Further Examination", requesting that Schiro be permitted to be examined by two psychiatrists of his own choosing and paid for by his parents [Tr. R. 69]; (6) "Motion for Appointment of Expert for Trial" [Tr. R. 93];[39] and (7) "Answer to Discovery Motion" where Schiro listed his defenses as "Not guilty (general denial)" and "Insanity" [Tr. R. 95].[40]

c. *Instructions.*

The jury received extensive guilt trial instructions regarding the mental state defenses and the state's burden on the charged counts.[41]

[38] This motion alleged that since his incarceration Schiro "has attempted suicide, has refused to eat for prolonged periods of time, has expressed his desire to die on numerous occasions, and has suffered a deterioration of his mental condition." [Tr. R. 67]. Schiro asked to be moved to an appropriate hospital or psychiatric institution [Tr. R. 67].

[39] In this motion, counsel noted that the state had the benefit of a number of persons assistance at trial. Since counsel had been appointed by the court, due to Schiro's indigency, and did not have the assistance of any other person, counsel requested that Dr. Frank Osanka be appointed to assist counsel at trial with ". . . cross examination of the State's witnesses and court appointed psychiatrists." [Tr. R. 93]. (Dr. Osanka had been retained by Schiro's family to assist in the preparation of Schiro's mental health defenses, however, the family had expended their available resources prior to trial and were unable to continue to pay Dr. Osanka. [Tr. R. 93].)

[40] In his discovery response, Schiro listed two groups of exhibits that he intended to offer at trial, both of which supported his mental health defenses: (1) "photos of a manikin at DeJong's"; and, (2) "letters written by the defendant to Mary T. Lee and Dr. Walt Abendroth" [Tr. R. 95].

[41] The court instructed the jury that: (1) the burden on the defense of insanity rested with the defendant by a preponderance of the evidence [J.A. 21]; (2) the elements of murder and felony murder [J.A. 21]; (3) the definitions of "intentional" and "knowing" [J.A. 22]; (4) the definition of the defense of insanity

2. *The issues of material fact were determined in Schiro's favor by a valid and final judgment.*

As illustrated, *supra* at 27-39, Schiro was acquitted of Counts I and III when the jury returned a single verdict at the close of the guilt trial which expressed its determination that Schiro was guilty of Count II, felony murder-rape. A valid and final judgment was entered on Schiro's conviction on Count II the same day the verdict was returned [Tr. R. 109, 137].

3. *The same parties relitigated the material facts at the death penalty trials.*

The document charging Schiro with Counts I-III was filed by the State of Indiana [J.A. 3-5]. The same parties were identified in the document requesting the death penalty [J.A. 6-7].

The death request was based on two aggravating factors [J.A. 6-7]. The "intentional" killing element was

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[J.A. 22]; (5) the definition of "mental disease" and "mental defect" [J.A. 22]; (6) the elements of *mens rea* murder as applied in Schiro's case [J.A. 22-23]; (7) the procedure following a verdict of not guilty by reason of insanity should not motivate the jury [J.A. 23]; (8) Schiro is not required to prove his innocence, but he is required to prove insanity by a preponderance of the evidence [J.A. 23-24]; (9) if Schiro is found not guilty by reason of insanity the court will conduct a mental competency hearing [J.A. 26]; (10) jury must decide extent of Schiro's mental disability from consideration of all evidence, including expert testimony [J.A. 26]; (11) medical insanity is not the same as legal insanity [J.A. 28]; (12) lay witness may express opinion on question of insanity [J.A. 28]; (13) jury is not bound to accept the opinion of experts on the issue of sanity [J.A. 28-29]; (14) the verdict of guilty but mentally ill and the definition of mental illness [J.A. 30]; (15) burden upon state to disprove mental illness for purposes of guilty but mentally ill verdict [J.A. 31]; (16) definition of preponderance of the evidence [J.A. 33]; and (17) jury should not find Schiro guilty for sole purpose of discouraging persons from raising insanity defense [J.A. 35].

common to both. Whether Schiro was capable of forming the requisite intent to kill was the central disputed issue at the guilt trial—that issue was resolved in Schiro's favor when he was acquitted of *mens rea* murder, Count I. In returning their guilt trial verdict, the jury expressed its conclusion that Schiro did not possess the requisite intent to kill. There is simply no other basis from the evidence, instructions or pleadings, which tends to suggest that the acquittals were based upon any determination other than that the state did not prove, beyond a reasonable doubt, that Schiro meant to kill. Once this determination was made, the state was collaterally estopped from requiring Schiro to run the gauntlet again at sentencing.[42]

As in *Turner v. Arkansas*, 407 U.S. 366 (1972) and *Harris v. Washington*, 404 U.S. 55 (1971), the material facts determined in Schiro's favor by virtue of the guilt trial verdicts were the same as the material facts at issue in the two charged aggravating circumstances.[43]

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[42] In fact, the mental state charged in Count I was less than the mental state required for the aggravating circumstances. See *infra* at 26-27. See also *Brown v. Ohio*, 432 U.S. 161 (1977) (conviction of lesser included offense bars trial for the greater if all facts for greater have occurred or could have been discovered by due diligence).

[43] Ind. Code § 35-50-2-9(b) provides that the state must prove the existence of the aggravating circumstance beyond a reasonable doubt. Because the prosecution's burden of proof on the *mens rea* element at the guilt trial was the same as its burden at the penalty trial, no issue of relative burdens of proof is presented. See *Dowling v. United States*, 493 U.S. 342 (1990); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

CONCLUSION

For all of the above argued reasons Schiro respectfully moves the Court to remand his case to the district court and order that court to grant the writ and vacate Schiro's death sentence, and for any and all other relief to which he may be entitled.

Respectfully submitted,

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APPENDIX

APPENDIX

35-50-2-9. Death sentences.—(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

* * * *

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme Court has completed its

review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, § 122].

35-41-4-3. Prosecution barred for same offense.—(a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:

(1) The former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.); or

(2) The former prosecution was terminated after the jury was impaneled and sworn, or, in a trial by the court without a jury, after the first witness was sworn, unless (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination, (ii) it was physically impossible to proceed with the trial in conformity with law, (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state, (v) the jury was unable to agree on a verdict, or (vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred. [IC 35-41-4-3, as added by Acts 1976, P.L. 148, § 1; 1977, P.L. 340, § 18.]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 8, 1992

Before
HON. WALTER J. CUMMINGS, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. HARLINGTON WOOD, JR., Senior Circuit Judge

No. 91-1509

THOMAS SCHIRO,
Petitioner-Appellant,

vs.

RICHARD CLARK, Superintendent, and
INDIANA ATTORNEY GENERAL,
Respondents-Appellees

Appeal from the United States District Court
for the Northern District of Indiana
South Bend Division

No. 83 C 588—Allen Sharp, *Chief Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by petitioner-appellant on August 21, 1992, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 92-7549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS N. SCHIRO,

Petitioner,

v

RICHARD CLARK, Superintendent,
Indiana State Prison, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Whether *Green v. United States*, 355 U.S. 184 (1957) and *Bullington v. Missouri*, 451 U.S. 430 (1981) can be extended to preclude, as a matter of double jeopardy or collateral estoppel, sentencing which relies in part on conduct which was alleged in a count charging knowing murder, where the jury found the defendant guilty of felony murder but did not decide the knowing murder count.

Whether, where the evidence showed that the defendant killed the victim so she could not report that he had raped her, the arguments and jury instructions did not present the "lack of intent" theory defendant now claims formed the basis for the verdict but told the jury to return only one verdict, and the state court found that the jury simply "chose not to consider" the knowing murder count, the jury's verdict that petitioner was guilty of felony murder can reasonably be viewed as an "implied acquittal" or other determination that defendant did not intentionally kill the victim.

Whether petitioner's proposed expansion of *Green* and *Bullington* constitutes a "new rule" that cannot form the basis of federal habeas corpus relief under *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny.

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BRIEF OF RESPONDENTS

JURISDICTIONAL STATEMENT

Respondents continue to believe that the petition for writ of certiorari was jurisdictionally out of time for the reasons stated at pages 7 through 9 of their Brief in Opposition to Petition for Writ of Certiorari. In all other respects, petitioner's jurisdictional statement is substantially accurate.

STATEMENT

On the evening of February 4, 1981, Petitioner Thomas N. Schiro gained entry to the home of Laura Luebbehusen on the pretext that he needed to use the telephone because he had car trouble. Once inside her home, he repeatedly raped her and then brutally murdered her for the express purpose of preventing her from reporting the rapes. A jury convicted Schiro of murder while committing or attempting to commit rape. The judge sentenced Schiro to death, finding as an aggravating factor that Schiro intentionally killed Luebbehusen during the commission of a rape.

1. On February 4, 1981, Schiro was an inmate at the Second Chance Halfway House in Evansville, Indiana, where he was serving a three-year sentence for robbery that was partially suspended in connection with a work release program. R. 113, 889-91.[1] Schiro worked at a construction site across the street from Luebbehusen's house. R. 1067-69. While at work that morning, Schiro first contemplated the rape when he saw a woman, dressed in a pajama top and panties, step out of Luebbehusen's home to retrieve the mail. R. 116, 1741.[2] Throughout the day, Schiro thought about and planned the rape, becoming more excited when he saw her a second time later in the day. R. 44, 1741. After work, instead of attending an Alcoholics Anonymous meeting — a condition of being able to serve the remainder of his sentence in the halfway house — Schiro stole a bottle of liquor from a

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[1] Citations in the form "R. ___" refer to the original, sequentially paginated, eight volume trial court record in the case, with the number referring to the page of the citation. The original trial record is found in volumes 8-15 of what are denominated "State Court Records" in the Seventh Circuit's Record of Proceedings. Citations in the form "J.A. ___" are to the Joint Appendix, and citations in the form "App. ___" are to the Appendix bound with this brief.

[2] It is unclear from the record whether the woman Schiro saw was actually Luebbehusen or her roommate.

liquor store and went to an adult book store to watch "quarter movies," short film clips of hard core pornography. R. 115, 1435, 1437, 1743. Schiro was thrown out of the book store after he repeatedly exposed himself to the female attendant. R. 1743. He then proceeded directly to Luebbehusen's house. R. 1439, 1743.

Schiro knocked on Luebbehusen's door and she answered, dressed in a robe. R. 905, 1743. To gain entrance into her home, he asked to use her telephone to call his father, telling her, falsely, that his car had broken down across the street. R. 905-06, 1744. After he feigned use of the telephone, he asked to use the restroom. R. 1425.

In the restroom, Schiro masturbated to achieve erection. R. 1744. He then emerged from the restroom and exposed himself to Luebbehusen, who reacted with shock and fear. R. 1426, 1745. Schiro attempted to relax her by telling her, again falsely, that he was homosexual and that his homosexual friends had bet him that he could not have intercourse with a woman. He told her that he did not want to hurt her but merely wanted to win the bet. R. 1426, 1745.

Schiro forced Luebbehusen to consume drugs and alcohol that he had found in the house, and then raped her. R. 1745, 1427. To sedate her further, he forced her to consume more "downers" and alcohol while he consumed "speed." R. 1427, 1748. She attempted to escape when he left the room, but he caught her at the door, dragged her by the hair back into house, and raped her again. R. 1749. He then took her with him to purchase more alcohol. R. 1427, 1749. Upon their return to the house he raped her at least once, and probably two more times, then passed out on the couch. R. 1427-28, 1749-50.

Schiro awoke to find Luebbehusen dressed and running for the door. R. 1428. She had written a warning note to her roommate, presumably to place on the front door of the house, stating "Darlene, don't come in please. I've called the

police." R. 480, 489, 550. When she saw that Schiro had regained consciousness, Luebbehusen pleaded that she would not "tell on him if he never let her see his face again." R. 1430.

Instead, Schiro decided to kill her so she could not report his crimes. R. 1430. He dragged her back into the bedroom, shouting that she could not leave, and ordered her to lie on the bed face down. R. 1428, 1750. While she remained on the bed, he thought that she either had passed out or had fallen asleep. R. 1750. He located a one-gallon vodka bottle and a steam iron and placed them next to her on the bed. R. 1429, 1750.

As Luebbehusen still lay on the bed, Schiro hit her on the head with the vodka bottle until it shattered. R. 1750. She begged him not to kill her, but he repeatedly struck her head with the iron, splattering blood throughout the room, eventually covering the walls and floor. R. 1429, 1751, 442; *see also* R. 491. She continued to resist, so he strangled her to death. R. 1429, 1751. He then dragged her body into the living room, disrobed her, and performed various additional sex acts on the body. R. 1429, 1751.

Schiro made an effort to clean the house before leaving. R. 1432. He took with him the gloves he had worn during the attack to avoid leaving fingerprints and later gave them to his girlfriend, who washed them, cut them into small pieces, and disposed of them. R. 1432-33. He also destroyed the clothing he had worn during the murder. R. 910. He returned to the halfway house at approximately 5:30 a.m. on February 5 and convinced the night supervisor to falsify the sign-in sheet to indicate that he had arrived at 12:15 a.m. R. 904.

Two days later, Schiro confessed to his girlfriend that he had raped and killed Luebbehusen. R. 1425-33. Two days after that, he confessed the incident to the director of the

halfway house, who immediately contacted the police. R. 892, 904-06.

2. Schiro was charged with three counts of murder: knowing murder (Count I); felony murder — rape (Count II); and felony murder — criminal deviate conduct (Count III). J.A. 3-5.[3] The state requested the death penalty only with respect to the felony murder counts. J.A. 6-7.

Evidence at trial showed Schiro to be a violent and dangerous man. His girlfriend testified that he would routinely beat, choke, bite and threaten her, in one instance knocking out several of her front teeth with his fist. R. 1447, 1463-67, 1472-73. Schiro also attempted to murder her and would often make life-threatening assaults on her son. R. 1464, 1461-62, 1181-82. Another woman testified that Schiro violently and repeatedly raped her while holding a gun to her one-year-old son's head and forcing her six-year-old daughter, who suffered from cerebral palsy, to watch. R. 1830-36. Schiro confessed to his expert, Frank Osanka, that he had committed some nineteen to twenty-four rapes prior to the time he raped and murdered Luebbehusen. R. 1721, 1728.

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[3]Indiana recognizes a single crime of murder that is statutorily defined as follows:

> A person who:
>
> (1) knowingly or intentionally kills another human being; or
>
> (2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery;
>
> commits murder, a felony.

Ind. Code § 35-42-1-1 (as it existed at the time of the crime, *see* Ind. Acts 1976, P.L. 148 § 2; Ind. Acts 1977, P.L. 340 § 25). The statute has since been amended to broaden the list of felonies. *See* Ind. Acts 1987, P.L. 326, § 2; Ind. Acts 1989, P.L. 296 § 1.

Schiro did not contest that he killed Luebbehusen; rather, his sole defense was that he was insane.[4] Nor did Schiro or his counsel suggest to the jury that he either lacked or could not form the requisite *mens rea* to commit murder or rape. In closing argument, his counsel argued that the insanity defense had been made out or that, at the very least, Schiro should be found guilty but mentally ill, but never argued the absence of the requisite level of intent.[5] *See* App. 15-26.[6] Schiro did, however, contest both of the underlying felonies alleged in the felony murder counts. For example, in his closing argument to the jury at the guilt phase, Schiro's counsel suggested that Schiro's intercourse with Luebbehusen

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[4]The court retained two psychiatrists to render expert opinions regarding Schiro's sanity. Dr. Charles Crudden concluded that, while Schiro was "a very dangerous man," he was not insane. R. 1183-84. Dr. Crudden did "not see how any psychiatric treatment would be of any benefit to him, and regardless of what treatment he received he would still remain a dangerous person." R. 1183. Dr. Barnard Woods also concluded that Schiro was not insane. R. 1287-88. The state's psychiatric expert, Dr. David G. Crane, also testified that Schiro was not insane. R. 1851.

Schiro presented expert testimony from Frank Osanka and Dr. Edward Donnerstein. Osanka, a "behavior consultant" who holds degrees in sociology and psychology but is not a psychiatrist, clinical psychologist or medical doctor, opined that Schiro was insane and diagnosed him as a "paranoid schizophrenic." R. 1692, 1752-54, 1760, 1767. Dr. Donnerstein likewise opined that Schiro was insane, but never personally interviewed Schiro, relying instead on "statements that he gave Doctor Osanka." R. 1639-40.

[5]Thus, petitioner's statement that "The principal dispute was whether Schiro 'knowingly' killed or whether, instead, the killing was the product of a sick mind plagued by a belief system ingrained with bizarre sexual ideation," Pet. Br. at 5-6, which is unaccompanied by any citation to the record, is simply untrue.

[6]The transcript of the final arguments at the guilt phase is contained in a separately paginated volume, denominated as Volume 4 of the "State Court Records" in the Seventh Circuit Record of Proceedings and is reproduced as Appendix A. App. 1-29.

was consensual. App. 25-26. Additionally, as noted in petitioner's brief, his counsel argued that the alleged acts of criminal deviate conduct all occurred after the death, and thus the murder did not occur "while" the defendant was committing or attempting to commit criminal deviate conduct. Pet. Br. at 37 & n. 32; App. 25.

In its preliminary instructions to the jury, the court explained that the state sought the death penalty only with respect to Counts II and III, the felony murder counts. J.A. 11. In its final instructions, the court told the jury:

> To sustain the charge of murder, the State must prove the following proposition:
>
> First:
>
> That the defendant engaged in the conduct which caused the death of Laura Luebbehusen;
>
> Second:
>
> That when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen.

J.A. 22-23.[7]

The court did not instruct the jury that it had to return verdicts on all counts, and the defendant did not seek any such instruction. *See* J.A. 21-36. To the contrary, his counsel told the jury that "you'll have to go back there and try to figure out which *one* of the eight or ten verdicts . . . that you will return to this court." App. 17 (emphasis added). Similarly, the prosecutor told the jury that "you are only going to be allowed to return one verdict." *Id.* at 27, 28. The

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[7]The trial court's final instructions also defined "murder" as either knowingly or intentionally killing OR killing in the course of one of the specified felonies, consistent with the Indiana statute set out in note 3, *supra*. J.A. 21.

prosecution asked the jury that its one verdict be that of murder while committing a rape:

> You may find that we have obviously proven that there was a rape. You may also find that we have obviously proven at this trial that there was a murder and that the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict.

App. 28.

Although the court provided the jury with ten alternative verdict forms, the jury returned a verdict of guilty as charged on Count II and left the remaining forms blank. J.A. 37-38.[8]

At the sentencing phase, consistent with its indictment, the state requested the death penalty based on the aggravating factor that Schiro intentionally killed Luebbehusen during the commission of a rape. Both parties relied on the trial record and adduced no additional evidence. R. 262-64. At no time during the penalty phase did Schiro suggest that the jury had implicitly found that he lacked the intent to murder. To the contrary, Schiro's counsel acknowledged that he believed the jury had found that Schiro intentionally murdered Luebbehusen:

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[8]The forms of possible verdict were: Not guilty by reason of insanity; Guilty of murder, but mentally ill; Guilty as charged on Count I; Guilty as charged on Count II; Guilty as charged on Count III; Not guilty; Guilty of the lesser included offense of voluntary manslaughter; Guilty of the lesser included offense of involuntary manslaughter; Guilty of voluntary manslaughter, but mentally ill; and Guilty of involuntary manslaughter, but mentally ill. J.A. 37-38. In the original record, the verdict forms set out above appeared on three sheets of paper, with the first three on a single sheet, the next three on separate sheet, and the last four on a third sheet. There is no indication of the order in which the sheets were arranged when given to the jury.

> The statute again, I'm not going to read the whole thing to you, because the Judge will send it back with you, provides for aggravating circumstances. There is one listed in this case, and one which you may consider. And that one is that the murder was committed, was intentionally committed in the commission of rape and some other things. I assume by your verdict Friday, or Saturday, that you've probably decided that issue. In finding him guilty of murder in the commission of rape, I'm assuming you've decided beyond a reasonable doubt that it was done in the commission of a rape, and so that aggravating circumstance most likely exists in your mind.

App. 31-32.[9] Accordingly, Schiro's counsel confined his argument to suggesting the presence of mitigating factors. App. 32-37.

The jury was instructed at the penalty phase that "[t]he Court is not bound by your recommendation." App. 40. The court also instructed the jury that it should not recommend the death penalty if it either found no aggravating circumstances or found any aggravating circumstances outweighed by mitigating ones, but that it "may" recommend the death penalty if it found that aggravating circumstances outweighed mitigating ones. *Id.* The jury returned a recommendation against the death penalty. J.A. 40.[10]

The trial court found the presence of the alleged aggravating factor — that Schiro intentionally killed

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[9]The final arguments and instructions at the penalty phase appear at R. 264-83 and are reproduced as Appendix B, App. 30-41.

[10]Indiana law applicable at the time provided that murder was punishable by death or by imprisonment of 30-60 years. Assuming full good-time credit, a defendant sentenced to a term of years would be eligible for release after serving half of his sentence. App. 39.

Luebbehusen during the course of a rape. The court then carefully considered and rejected each of the mitigating factors urged by Schiro. J.A. 45-50; *see also* J.A. 42-44. Thus, the court rejected the jury's recommendation and imposed the death penalty.

3. The Indiana Supreme Court affirmed Schiro's conviction and sentence on direct appeal. J.A. 51. This Court denied Schiro's petition for a writ of certiorari. 464 U.S. 1003 (1983).

Schiro then filed a petition for postconviction relief, claiming that the trial court was biased and that his counsel was ineffective. The trial court (by special judge) denied the petition. The Indiana Supreme Court again affirmed, J.A. 101, and this Court again denied certiorari. 475 U.S. 1036 (1986).

Schiro then filed a second petition for postconviction relief, in which he argued, for the first time, that his sentence was barred by the Double Jeopardy Clause of the United States Constitution because the jury had "acquitted" him of the aggravating factor on which his sentence was based. J.A. 130. The trial court denied the petition, and the Indiana Supreme Court again affirmed, holding that, under Indiana law and on the basis of this record, the jury's silence on Count I did not constitute an acquittal of that count:

> The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, *it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider.*

J.A. 140 (emphasis added). This Court again denied certiorari. 493 U.S. 910 (1989).

Schiro then sought a writ of habeas corpus under 28 U.S.C. § 2254 from the district court, raising, among several other grounds, his double jeopardy claim. The district court denied the writ. J.A. 146. The court of appeals unanimously affirmed. J.A. 183. In rejecting Schiro's double jeopardy claim, the court of appeals relied principally on the Indiana Supreme Court's determination that jury did not acquit Schiro of intentional murder. J.A. 195-98.

SUMMARY OF THE ARGUMENT

I. The petitioner's novel claim is that when a jury finds a defendant guilty of felony murder but is silent on a separate charge of intentional murder, the verdict must be deemed an "acquittal" of the latter for the purposes of sentencing the defendant. Nothing in this Court's precedents supports such an extension of the double jeopardy protection. Indeed, properly viewed, petitioner's claim is one of collateral estoppel, not double jeopardy.

A. Double jeopardy protects a defendant from retrial whether he is acquitted or convicted in the first proceeding. Taken to its logical conclusion, therefore, petitioner's double jeopardy argument would prevent *any* sentencing of a defendant after the "guilt phase" of a trial has ended. It is for this reason that this Court has resisted attempts to extend the principles of prior acquittal to sentencing.

B. The "implied acquittal" doctrine, on which petitioner relies so heavily, deduces that a finding of guilt on a *lesser* offense indicates acquittal of a *greater* charged offense. However, that doctrine has no application where, as here, the defendant is charged with two equal theories of committing the same offense. Under Indiana law, as at common law, intentional murder and felony murder are simply two different ways of committing the offense of murder; neither is lesser than or included in the other. Thus there is no rational basis for assuming that a conviction of one constitutes an acquittal of the other.

C. *Bullington v. Missouri*, 451 U.S. 430 (1981), is limited to its prohibition of a *second* capital sentencing hearing after a defendant has been "acquitted" of the death sentence in the first hearing. This Court has expressly refused to extend *Bullington* to prevent relitigation of discrete aggravating circumstances. Moreover, *Bullington*'s focus on the "embarrassment, expense, and ordeal" of a second trial does not apply to the original sentencing hearing. Thus the petitioner's claim is more properly understood as a claim of collateral estoppel, *i.e.*, that the jury resolved the issue of "intent to kill" in his favor at the guilt phase in a way that precluded the trial judge from finding intent to kill in sentencing him.

In sum, this Court's "implied acquittal" cases hold that the state has only one opportunity to prove guilt, and *Bullington* holds that the state has only one opportunity to prove that the death penalty is appropriate. None of this Court's precedents, however, stands for the novel proposition that the state is not entitled to proceed at both the guilt and sentencing phases where the defendant has been *convicted*.

II. The petitioner's burden to establish a collateral estoppel claim is heavy. He must show that the jury "actually determined" that the killing was committed without the requisite intent. Any uncertainty about whether the jury decided the issue of intent prevents the estoppel. On this record, Schiro cannot even approach the necessary showing.

III. Regardless of the characterization of Schiro's claim, it fails because the record in this case clearly shows that the jury did *not* decide that Schiro lacked the intent to kill and did not "acquit" him of anything. Instead, the jury chose the verdict that most comprehensively described the offense he committed, a killing during the course of rape.

A. The record shows this in a variety of ways:

- The evidence showed that Schiro, by his own admission, decided to kill the victim after the rapes so that she could not report them.
- The instructions told the jury it could find either knowing murder OR felony murder, but did not instruct the jury to make findings on both.
- The prosecutor and defense counsel told the jury that it should return only one verdict in the case, and this was supported by the jury instructions and Indiana law.
- The prosecutor *asked* the jury to return a verdict of felony murder and the jury knew that the state had requested the death penalty only on the felony murder counts.
- Schiro's attorney never asked the jury to find lack of intent — an issue analytically distinct from insanity.
- By finding Schiro guilty of felony murder, the jury not only rejected the insanity defense but also had to find that he intended to commit the underlying felony, rape. On this record, there is no rational basis for concluding that the jury found that Schiro could and did form the intent to rape but not to kill.

B. The lower federal courts correctly deferred to the Indiana Supreme Court's finding that the jury "chose not to consider" the knowing murder count and therefore did not resolve the issue of intent to kill. Such deference is required in habeas corpus cases by 28 U.S.C. § 2254(d) and in other cases by the strictures of federalism. The issue of what a jury meant by its verdict is fact-sensitive, and the state courts are in a better position by virtue of their knowledge and experience to determine the meaning, if not the legal effect, of a particular verdict. The Indiana Supreme Court's conclusion

was fairly supported by the record in this case and should therefore control.

IV. Finally, should this Court be inclined to extend double jeopardy or collateral estoppel principles to the situation presented by this case, it should not announce such a novel rule and apply it retroactively to this case. As argued above, the petitioner's double jeopardy theory would require this Court to hold that an original sentencing hearing is a second "trial" and that a conviction of one theory of proving an offense constitutes an implied acquittal of any equally valid theories of proving the same offense. Moreover, the notion that a sentencing judge is "collaterally estopped" by supposed findings underlying the verdict at the guilt phase is itself wholly novel. Such a holding would be a "new rule" not subject to announcement or retroactive application in a habeas corpus case.

The two narrow exceptions to the "new rule" doctrine do not apply here. The first exception does not apply because Schiro's new rule would not decriminalize private conduct (killing rape victims) nor would it immunize a category of defendants based on their status or offense. It is not an absolute bar to subjecting a defendant to the power of the court (as are some double jeopardy principles) because the rule that petitioner seeks would only preclude particular issues, not entire sentencing hearings.

The second exception does not apply because the new rule sought by Schiro would not be a "watershed rule of criminal procedure" that significantly enhances the accuracy of the determination that Schiro is eligible for the death penalty. There is nothing in the mechanistic rule Schiro seeks that would enhance the accuracy of a capital sentencing proceeding.

ARGUMENT

I. PETITIONER'S DOUBLE JEOPARDY CLAIM IS NOT CONSISTENT WITH ESTABLISHED PRINCIPLES OF DOUBLE JEOPARDY LAW; IF HE HAS A CLAIM AT ALL, IT IS ONE OF COLLATERAL ESTOPPEL RATHER THAN DOUBLE JEOPARDY.

At bottom, petitioner's claim is that the jury, in the guilt phase, made a finding on the intent issue that was binding on the trial judge at the penalty phase. This claim, properly viewed, is one of collateral estoppel rather than of double jeopardy *simpliciter*. Double jeopardy, in the classic sense, prevents retrial regardless of whether the first trial ended in conviction or acquittal, a result that obviously makes no sense when applied to the guilt and penalty phases of a bifurcated capital case. Nor does the "implied acquittal doctrine," which holds that conviction of a lesser included offense operates as an acquittal of a greater offense, have any application where the jury is simply told to return one verdict on two equivalent theories of the same offense — murder. Moreover, even recent developments in double jeopardy, such as *Bullington v. Missouri*, 451 U.S. 430 (1981), which holds that a *second* capital sentencing proceeding is barred when the first ended in a "death penalty acquittal," have no application to an *initial* capital sentencing proceeding.

A. Classic Double Jeopardy Principles Do Not Support the Result Petitioner Seeks.

Schiro's double jeopardy claim rests on two fundamentally erroneous propositions. First, he argues that the guilt and sentencing phases of a single capital case constitute entirely separate prosecutions for double jeopardy purposes — a proposition that finds no support in this Court's precedents. More extraordinarily, he further contends that his jeopardy ended at the conclusion of the guilt

phase. This novel framework is irreconcilable with this Court's double jeopardy jurisprudence and the historical underpinnings of the Clause.

As this Court has noted, the protections afforded by the Double Jeopardy Clause have their historical roots in the common law pleas of prior conviction and prior acquittal. *United States v. Wilson*, 420 U.S. 332, 339-42 (1975); *see also United States v. DiFrancesco*, 449 U.S. 117, 128 (1980).[11] Thus, this Court has long held that once an allegation of an offense is finally resolved, the defendant is protected from further prosecution *regardless of whether he was convicted or acquitted in the first prosecution*. *E.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal [and] against a second prosecution for the same offense after conviction."). [12] Accordingly, the guilt phase and the sentencing phase of a single capital proceeding cannot constitute separate prosecutions. Otherwise, the state could never advance to the sentencing phase because, as Schiro argues here, jeopardy would end at the conclusion of the guilt phase.

That petitioner's claim does not fall within the scope of traditional double jeopardy analysis is confirmed by this

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[11] As this Court noted in *DiFrancesco*, double jeopardy also had roots in the common law plea of former pardon. 449 U.S. at 128. Additionally, the Clause may have borne some relationship to the now obsolete plea of prior attaint. *See*, J. Sigler, DOUBLE JEOPARDY at 18-20 (1969).

[12] The ancient plea of former conviction, as an aspect of the Double Jeopardy Clause, has found its primary expression in this Court's decisions holding that a subsequent prosecution may not be maintained for a greater offense after the defendant has already been convicted of a lesser included offense. *E.g.*, *Brown v. Ohio*, 432 U.S. 161 (1977); *see also United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849 (1993).

Court's statement of the protections afforded by the Clause in *North Carolina v. Pearce*:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

395 U.S. at 717; *see also Wilson*, 420 U.S. at 342-43. Notably absent from the list of protections recognized by this Court is any mention of some constitutionally mandated relationship between the jury's verdict and the trial court's sentencing decision.

Indeed, this Court has *never* held that an original sentencing hearing is a separate prosecution for double jeopardy purposes, and has consistently declined to accept any such notion. In *DiFrancesco*, for example, this Court refused to consider the initial pronouncement of sentence an "acquittal" of imposition of a greater sentence after remand. In *Moore v. Missouri*, 159 U.S. 673 (1895), this Court refused to hold that a sentencing hearing under a recidivist-enhancement statute was a second trial or multiple punishment for the prior offenses.

In its jurisprudence under the Double Jeopardy Clause, this Court has applied the so-called "*Blockburger* test" to hold that a subsequent prosecution is not barred if each crime contains an element that the other does not. *See Dixon*, 113 S. Ct. at 2856 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).[13] However, petitioner concedes that, under the *Blockburger* test, felony murder and intentional

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[13] In *Dixon*, this Court overruled *Grady v. Corbin*, 495 U.S. 508 (1990), which had, in addition to requiring that the crimes contain mutually exclusive elements, required that they pertain to different conduct by the defendant in order to be separate offenses for double jeopardy purposes. *See* 113 S. Ct. at 2860.

murder are not the "same offense." Pet. Br. at 25-26 & n. 23. It follows then, under petitioner's view of the case, that he could have been tried separately for the two "crimes" without violation of the Double Jeopardy Clause, regardless of which was tried first, and regardless of whether he was convicted or acquitted at the first trial. *Dixon* (prior conviction); *Burton v. United States*, 202 U.S. 344 (1906) (prior acquittal). This again confirms that petitioner's claim is not one of simple "double jeopardy."

If, however, he were *acquitted* of one of the offenses, *and* that acquittal can be shown to have resulted from an actual and unambiguous determination of some fact that would conclusively bar conviction for the second offense, then *collateral estoppel* would preclude the second prosecution. *See Ashe v. Swenson*, 397 U.S. 436 (1970). Schiro's claim is a variant of this latter variety, which he seeks to apply to a supposed finding on a single element of one aggravating factor. He does not claim that the state would have been precluded from proceeding to the sentencing phase had the jury returned verdicts of conviction on all three counts. Nor could he logically do so. For if the state is entitled to "one fair opportunity" to try and convict a defendant, *Bullington*, 451 U.S. at 446 (citation omitted), that opportunity surely extends to seeing that he is not only convicted but also sentenced. Rather, petitioner's claim is that the jury found some fact (lack of the intent to kill) and that finding was binding on the trial court at sentencing. Properly viewed, this is a claim of collateral estoppel, not double jeopardy.[14]

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[14]Assuming that there is any merit to the notion of a constitutionally mandated "collateral estoppel" relationship between the jury's fact finding at the guilt phase and the sentencer's fact finding at the sentencing phase, it is far from clear that such a requirement would be properly grounded in the Double Jeopardy Clause. For example, *Dairy Queen v. Wood*, 369 U.S. 469 (1962), and *Beacon Theaters v. Westover*, 359 U.S. 500 (1959), both suggest that the Seventh Amendment requires a federal judge to give preclusive effect to a jury's findings on a "mixed" law and equity claim that must first be tried to a jury under the Seventh Amendment. And in *Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16 (1979), and *Ingraham v. Wright*, 430 U.S. 651, 664-71 (1977), this Court analyzed preconviction deprivations alleged to be cruel and unusual punishment under the Due Process Clause because "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Ingraham*, 430 U.S. at 671-72 n. 40. Prior to that time "The pertinent constitutional question is whether the imposition is consonant with the requirements of due process." *Id.* at 671. Similarly, assuming that there is *any* constitutionally required relationship between the guilt phase verdict, and facts found at sentencing, it would more properly be found in the Due Process Clause, or the Sixth Amendment's right to a jury trial, rather than the Double Jeopardy Clause. Schiro, however, has raised no such claims in this Court, and it would be inappropriate for this Court to comment on the contours of claims not presented in the petition. *See, e.g., Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 & n. 23 (1989) (Court declined to decide whether punitive damages award violated due process where only claim made in petition was that award violated Eighth Amendment's Excessive Fines Clause).

B. The "Implied Acquittal" Doctrine Does Not Apply Where the Jury's Verdict is Merely One of Two Alternative Means of Proving the Same Offense.

Schiro's reliance on the "implied acquittal" doctrine of *Price v. Georgia*, 398 U.S. 323 (1970), and *Green v. United States*, 355 U.S. 184 (1957), is similarly unavailing. Neither case even remotely suggested that a sentencing phase is a separate prosecution for double jeopardy purposes. More importantly, each differs from this case in two key respects. First, *Price* and *Green* involved a reprosecution of an accused for a greater offense after he had been convicted of a lesser-included offense. *See Price*, 398 U.S. at 327; *Green*, 355 U.S. at 189-90. Second, in *Price* and *Green*, each defendant

was subjected to a complete reprosecution for the greater offense following the reversal on appeal of the conviction for the lesser-included offense. 398 U.S. at 324-25; 355 U.S. at 186. Those two core facts — both of which are missing here — formed the basis for this Court's analysis. Thus, in those cases this Court held that the Double Jeopardy Clause barred reprosecution for the greater offense but allowed reprosecution for the lesser-included offense for which the accused had been originally convicted. The Court reasoned that the jury's silence with respect to the greater offense in the first trial was an "implicit acquittal" of that charge and that "the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge." *Price*, 398 U.S. at 329 (quoting *Green*, 355 U.S. at 191).

The holdings of *Price* and *Green* cannot be extended to include the very different situation in this case. When a jury elects to convict a defendant of a lesser-included offense and is silent on the greater one, there exists a degree of certainty that the jury was unable to find that the defendant committed the greater crime or that the jury nonetheless intended to exercise its prerogative to acquit against the evidence. That is simply not true of felony murder and knowing murder, which under Indiana law, as under the common law, are two ways of proving the same offense, *i.e.*, murder. *See Schad v. Arizona*, 501 U.S. ___, 111 S. Ct. 2491, 2501 (1991) (plurality opinion); *id.* at 2505-06 (Scalia, J., concurring); *Head v. State*, 443 N.E.2d 44, 48 (Ind. 1982).[15]

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[15]Within two years of Indiana's statehood, its legislature passed what appears to be the state's first murder statute, which provided:

> If any person or persons of sound memory and discretion, unlawfully killeth any reasonable creature, in being and under the peace of this state, with malice aforethought either express or implied, the person or persons so offending, shall be adjudged guilty of *murder*, and upon confession or conviction thereof by a jury of the county, shall have judgment of death.

2 Laws of Ind., ch. V, § 2 (1818) (emphasis in original). At that time, the Indiana courts considered the state to have adopted the common law of England and the above statute to be "merely declaratory of the common law." *Fuller v. State*, 1 Blackf. 63, 65-66 (1820).

When its code was revised in 1843, Indiana replaced the terms "malice aforethought either express or implied" with their more descriptive modern equivalents:

> If any person of sound memory and discretion shall purposely and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any reasonable creature in being and under the peace of this state, such person shall be deemed guilty of murder in the first degree, and upon due conviction thereof shall suffer death.

Ind. Rev. Stat., ch. 53, § 2 (1843). *Compare Schad*, 111 S. Ct. at 2501 (at common law, intent to commit a felony was considered an aspect of the concept of "malice aforethought") (citing 3 J. Stephen, HISTORY OF THE COMMON LAW OF ENGLAND 21-22 (1883)). Felony murder has remained an equal, independent means by which to commit murder to this day. *E.g.*, 2 Ind. Rev. Stat., pt. III, ch. VI, § II (1852); Ind. Rev. Stat., § 1904 (1881); 1905 Ind. Acts, ch. 169, § 347; 1941 Ind. Acts, ch. 148, § 1; 1976 Ind. Acts, P.L. 148, § 2.

Indeed, felony murderers are often more culpable than intentional murderers. As this Court has noted, "some nonintentional murderers may be among the most dangerous and inhumane of all." *Tison v. Arizona*, 481 U.S. 137, 157 (1987). This understanding of felony murder is clearly applicable here. The state sought the death penalty only with respect to the felony murder counts but not with respect to the knowing murder count — a fact of which the jury was fully aware. J.A. 7, 11. Moreover, the trial court instructed the jury that to convict of any species of murder, including felony murder, it had to find that Schiro killed Luebbehusen

intentionally. J.A. 22-23. Thus, the jury chose to convict Schiro of the crime that was the most serious and carried the highest possible penalty. Unlike *Price* and *Green*, the jury's silence with respect to Count I cannot logically be presumed to represent an acquittal.

The language that Schiro seeks to borrow from *Price* and *Green* — that the jury had "a full opportunity to convict" — is similarly unavailing. Indeed, this Court suggested in *Price* that a situation like the present one, where the jury was required to render only one verdict from two equal and alternative theories of murder, does not provide the jury with a "full opportunity" to return a verdict on both theories. 398 U.S. at 329 & n. 5 (citing *People v. Jackson*, 20 N.Y.2d 440, 285 N.Y.S.2d 8, 231 N.E.2d 722 (1967), *cert. denied*, 391 U.S. 928 (1968)).

The Court's reliance on *Jackson* is highly significant because of the close similarity between *Jackson* and this case. In *Jackson*, the defendant had been charged with both felony murder and premeditated murder (both of which constituted first degree murder under New York law). At the conclusion of his first trial, the jury returned a verdict of guilty of premeditated murder but was silent on the felony murder theory. His conviction was ultimately overturned by this Court on grounds pertaining to the voluntariness of a confession that was admitted at his first trial. *See Jackson v. Denno*, 378 U.S. 368 (1964). On retrial, the prosecution again attempted to prove both premeditated murder and felony murder, and the defendant objected, claiming that the implied acquittal principle of *Green* barred his retrial on the felony murder theory. Rejecting his claim, the New York Court of Appeals held that double jeopardy did not bar the retrial:

> Since the jury was instructed to render only one verdict, it had no reason to consider the felony murder charge once it found the defendant guilty of premeditated murder. We are, of course, aware of the fact that the Judge instructed the jury that the order of consideration of the respective theories was entirely up to them. Thus, it is possible that the jury considered felony murder first and acquitted him of that theory but under the single verdict charge the jury was not able to express an acquittal, and to say that the defendant was so acquitted would be to engage in mere speculation.

231 N.E.2d at 730-31.[16] Similarly here, the jury was told to render only one verdict, App. 17, 27, 28, and to conclude that the jury acquitted Schiro of knowing murder would be sheer speculation, if not total fiction. *See also Cichos v. Indiana*, 385 U.S. 76, 79-80 (1966) (rejecting contention that petitioner was impliedly acquitted where jury was instructed to return only one verdict on multiple theories of the same offense).

C. The Capital Sentencing Hearing In This Case Was Not A "Successive Prosecution" Under *Bullington v. Missouri*.

Bullington v. Missouri dealt with a *second* capital sentencing proceeding in which the state sought to achieve a result at odds with the first. While *Bullington* held, by a five-to-four majority, that a state may not subject a defendant to a *second* capital sentencing hearing when the first has ended in a death penalty "acquittal," that holding cannot be expanded to reach a conclusion that the *first* capital sentencing hearing constitutes a second "jeopardy" simply because it follows the trial on guilt or innocence. Neither *Bullington*, nor this Court's subsequent cases construing it, suggest that it applies in such a novel way.

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[16] The same result was reached on federal habeas review. *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972).

Poland v. Arizona, 476 U.S. 147 (1986), for example, held that a second capital sentencing hearing is not barred where the only aggravating circumstance relied upon by the sentencing judge was found unsupported by the evidence on appeal, but the appellate court also corrected the sentencing judge's legally erroneous ruling on the scope of another aggravating circumstance, permitting consideration of that circumstance (and imposition of the death penalty) on remand. The Court noted that the proper *Bullington* inquiry was whether the sentencer had "acquitted" the defendant of the death penalty *in toto* and that *Bullington's* focus on the fact that the sentencer had only two alternatives was "inconsistent with the view that for double jeopardy purposes the capital sentencer should be seen as rendering a series of mini-verdicts on each aggravating circumstance." 476 U.S. at 153 n. 3. Thus, this Court held:

> We reject the fundamental premise of petitioner's argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate*. We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point.

476 U.S. at 155-56 (emphasis in original, footnote omitted).

Petitioner's claim here is similar. He has not contended that the jury "acquitted" him of the death penalty. Under Indiana law, the jury had no such power. *See* Ind. Code § 35-

50-2-9(e); *cf. Spaziano v. Florida*, 468 U.S. 447, 465 (1984) (holding constitutionality of allocating capital sentencing decisions to a judge, rather than a jury, "disposes of petitioner's double jeopardy challenge" because jury's sentencing recommendation "does not become a judgment simply because it comes from a jury."). Rather, petitioner claims that the jury acquitted him of the "intent" element in the aggravating circumstance of an intentional killing during the course of a felony. Under *Poland*, this is simply insufficient to constitute a *Bullington* "death penalty acquittal."

Bullington, to the extent that it survives,[17] should not be extended to hold that an *original* capital sentencing hearing is a "subsequent prosecution" for double jeopardy purposes. Such an extension would serve none of the purposes of the Double Jeopardy Clause as enunciated by this Court, and would "push the analogy on which *Bullington* is based past the breaking point." *Poland*, 476 U.S. at 156.[18]

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[17]The grant of certiorari in *Caspari v. Bohlen*, No. 92-1500, *cert. granted*, 113 S. Ct. 2958 (1993), encompasses the question of whether *Bullington* should be overruled. *See* 61 U.S.L.W. 3778. The overruling of *Bullington* would, of course, render unnecessary a determination of its application to this case.

[18]Moreover, this Court's prior acquittal precedents uniformly forbid *reprosecution* or *retrial* of a defendant who has been acquitted of the crime charged. *See, e.g., Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873) (common law forbade a "second trial" for same offense); *United States v. Ball*, 163 U.S. 662, 671 (1895) (acquittal bars "subsequent prosecution" for same offense); *Green v. United States*, 355 U.S. 184, 188 (1957) (quoting *Ball*, holding that prior acquittal barred *retrial* after remand); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568-70 (1977) (controlling constitutional principle focuses on prohibition of "multiple trials;" Double Jeopardy Clause not offended where there is no threat of "successive prosecutions."); *United States v. Wilson*, 420 U.S. 332, 344 (1975) (same; government appeal does not implicate double jeopardy "where appellate review would not subject the defendant to a second trial"). Thus this Court has *never* held that an

In sum, while *Green* and *Price* hold that the state can be afforded only one opportunity to prove guilt, and *Bullington* holds that the state can be afforded only one opportunity to prove that the death penalty is appropriate none of those cases stands for the novel proposition that the state is not entitled to proceed at both the guilt and sentencing phases where the defendant has been convicted. Petitioner's unwarranted expansion of those cases should be rejected.

II. COLLATERAL ESTOPPEL PRECLUDES RELITIGATION OF AN ISSUE ONLY WHERE THE ISSUE WAS ACTUALLY DETERMINED IN A PRIOR PROCEEDING.

Because his claim has no basis in pure double jeopardy law, Schiro must fall back on principles of collateral estoppel to prevail on his claim that the trial court was precluded from finding intent to kill. The burden is a difficult one for a petitioner to meet.

The doctrine of collateral estoppel applies in limited circumstances. Under that doctrine, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). *See also id.* at 442 (collateral estoppel bars "relitigation between the same parties of issues actually determined at a previous trial"). The standard for whether an issue of ultimate fact has been "actually determined" is exacting. Collateral estoppel does not bar relitigation if the jury "could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (citation omitted). *See also*

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original sentencing hearing is a separate "trial" or "prosecution" for double jeopardy purposes, and has consistently avoided such a holding. *See* cases cited *supra* at 17.

Dowling v. United States, 493 U.S. 342, 352 (1990) (collateral estoppel is not applicable where "[t]here are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial."); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) ("the jury verdict in the criminal action did not *negate the possibility* that a preponderance of the evidence could show that Mulcahey was engaged in an unlicensed firearms business.") (emphasis added).

For collateral estoppel to bar reprosecution, there can be no ambiguity whatsoever about which facts were actually decided by the prior verdict. For example, in concluding that the jury decided that a defendant did not participate in robbery, this Court in *Ashe* explained that the jury's verdict "can lead to but one conclusion." 397 U.S. at 445. Similarly, in *Turner v. Arkansas*, 407 U.S. 366 (1972), this Court held that "the *only logical conclusion* is that the jury found that he was not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates." *Id.* at 369 (emphasis added). Finally, in *Harris v. Washington*, 404 U.S. 55 (1971), no uncertainty existed because the "State concede[d] that the ultimate issue of identity was decided by the jury in the first trial." *Id.* at 56. *See also Simpson v. Florida*, 403 U.S. 384, 386-87 (1971).

The Court has steadfastly refused to expand the doctrine of collateral estoppel to instances where it is unclear what issues the prior verdict decided. Thus, collateral estoppel does not bar evidence of criminal conduct for which that defendant had been acquitted. *Dowling*, 493 U.S. at 352. Collateral estoppel does not bar a defendant's prosecution for aiding and abetting when the principal has been acquitted. *Standefer v. United States*, 447 U.S. 10, 21-25 (1980). Nor does the doctrine bar forfeiture proceedings arising out of conduct for which the defendant has been acquitted. *One Assortment of 89 Firearms*, 465 U.S. at 361-62, *One Lot Emerald Cut*

Stones and One Ring v. United States, 409 U.S. 232, 234-35 (1972).

The burden for demonstrating that the issue whose relitigation he seeks to foreclose was actually decided in the prior trial rests squarely with the defendant. *Dowling*, 493 U.S. at 350. That burden is a significant one, *see id.* at 351-52, as "collateral estoppel should be applied sparingly against the Government." *Id.* at 360 n.3 (Brennan, J., dissenting) (citing *Standefer*, 447 U.S. at 22-24). As shown below, Schiro does not even come close to meeting these exacting standards.

III. THE RECORD DOES NOT SHOW THE JURY "ACQUITTED" SCHIRO OF INTENTIONAL KILLING OR RESOLVED THE INTENT ISSUE IN HIS FAVOR.

Regardless of whether Schiro's claim is characterized as a double jeopardy claim in which he must show an express or implied "acquittal," or as a collateral estoppel claim in which he must show the jury "actually determined" the issue of intent in his favor, the fundamental factual premise of the claim is that the jury exonerated him of the element of an intentional killing when it returned a guilty verdict on felony murder but was silent on "knowing" murder. Each of the four courts to consider the issue has rejected this underlying factual premise. This Court too should reject the premise, because the record simply does not support it. The jury did not acquit petitioner of anything and did not resolve the intent issue in his favor. That conclusion is further reinforced when the appropriate deference is accorded to the findings of the Indiana courts on this issue.

A. Review of the Evidence, Instructions, Arguments and Verdict Demonstrates That the Jury's Silence on the "Knowing" Murder Count Did Not Amount to an "Acquittal" or Other Determination on the Issue of Intent.

Review of the entire record in this case demonstrates that no "acquittal," implicit or otherwise, occurred. As this Court has held, an "acquittal" is a "ruling . . . [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Here, by contrast, there was, as the Indiana Supreme Court found, *no* resolution of the "knowing murder" count. Rather, what the jury obviously did, consistent with the instructions, verdict forms, argument, and evidence in the case, was return the one verdict that *most* completely described the facts of the case — that petitioner committed a murder during the course of a rape.

Under the evidence outlined in the statement of facts, *supra*, there can be no doubt that this was the most complete single verdict of all of the verdict forms submitted to the jury. By his own admission, petitioner raped the victim and then decided to kill her to avoid getting caught. A simple verdict of "murder" would not have fully expressed the heinousness of this crime.[19]

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[19]Even though the murder occurred after the offense of rape had been completed, it is clear under Indiana law that it was committed "while" the defendant was committing or attempting to commit the rape. *See Davis v. State*, 477 N.E.2d 889, 894 (Ind.), *cert. denied*, 474 U.S. 1014 (1985) ("When there is a close proximity in terms of time and distance between the underlying felony and the homicide and there is no break in the chain of events from the inception of the felony to the time of the homicide, we treat the two events as part of one continuous transaction."). Schiro has never contended otherwise.

Nor can there be any doubt that the jury viewed its task as returning a single verdict, rather than any and all possibly appropriate verdicts. The trial court never instructed the jury that it was required to return verdicts on all counts. Rather, it instructed the jury, at petitioner's request, that "the defendant is not on trial for any *offense* other than *that* charged in the information," and referred, again in the singular, to "the *crime* charged." J.A. 31 (emphasis added). Similarly, defense counsel told the jury that "you'll have to go back there and try to figure out which *one* of the eight or ten verdicts. . . that you will return to this court." App. 17 (emphasis added). The prosecution likewise repeatedly told the jury that "you are only going to be allowed to return one verdict." *Id.* at 27; *see also id.* at 28. Indeed, the prosecutor explicitly argued to the jury that its one verdict should be of a murder during the course of a rape:

> You may find that we have obviously proven that there was a rape. You may find that we have obviously proven at this trial that there was a murder and the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict.

Id. at 28.

The prosecution and defense arguments were entirely consistent with longstanding Indiana trial practice of instructing the jury to return only one verdict where multiple theories of the same offense are charged, as recognized by this Court in *Cichos v. Indiana*, 385 U.S. 76, 79-80 (1966). Moreover, the Indiana Supreme Court has repeatedly held that, while the alternative theories of murder and felony murder may be tried together, a defendant may not be convicted of both for the killing of a single victim. *E.g.*, *Sandlin v. State*, 461 N.E.2d 1116, 1119 (Ind. 1984); *Bean v. State*, 267 Ind. 528, 371 N.E.2d 713, 716 (1978). Indeed,

where two convictions are erroneously entered, the Indiana Supreme Court has, on occasion, ordered the *non*felony murder conviction vacated. *Rondon v. State*, 534 N.E.2d 719, 729-30 (Ind.), *cert. denied*, 439 U.S. 969 (1989). Thus, both because the jury was told it should only return one verdict and because, under Indiana law, petitioner could only be properly convicted on one count, the jury's conviction on the single most comprehensive and descriptive count cannot realistically be viewed as an "acquittal" of any of the others. Rather, as the Indiana Supreme Court found, the jury simply "chose not to consider" the knowing murder count once it reached a verdict of guilty of felony murder. J.A. 140.

The jury instructions given by the trial court also fail to support petitioner's "implied acquittal" theory. Consistent with the murder statute, the trial court instructed the jury that murder consists of knowingly killing OR killing in the course of a specified felony. J.A. 21, quoting Ind. Code § 35-42-1-1. Unlike a case in which the jury must decide between greater and lesser included offenses, here the jury was simply given two equal alternatives. As in *Jackson*, there is no basis for concluding that these alternatives were considered in any particular order or that acceptance of one constituted rejection of the other.[20]

Moreover, petitioner ignores the fact that the jury was instructed clearly, if erroneously, that:

> To sustain the charge of murder, the State must prove the following proposition:

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[20] As noted in section I.B, *supra*, the "implied acquittal" doctrine of *Green v United States* and *Price v. Georgia* has no application where, as here, the different counts are merely multiple and equivalent theories of murder. Moreover, even if the doctrine could be applied to such a circumstance in a true double jeopardy claim, it would still not satisfy the requirement of *collateral estoppel* that the issue sought to be foreclosed was "actually determined."

First:

> That the defendant engaged in the conduct that caused the death of Laura Luebbehusen;

Second:

> That when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen.

J.A. 22. Petitioner's contention that this instruction applied only to "*mens rea* murder" is simply unsupported by a review of the jury instructions as a whole. The trial court instructed the jury that "murder" was defined as *either* an intentional or knowing killing *or* a killing during the course of one of the specified felonies, J.A. 21, and the instruction quoted above was the *only* instruction setting out the state's burden of proof for murder.[21]

Petitioner's theory becomes even less tenable when one considers the argument presented by his counsel to the jury, both at the guilt and penalty phases. Petitioner's theory, simply put, is that the jury acquitted him of the "knowing murder" count because it found that he lacked the requisite intent element. However, petitioner *never presented this theory to the jury*. In closing argument, his counsel argued that the insanity defense had been made out, or that, at the very least, the defendant should be found guilty but mentally ill, *see* App. 15-26, but never argued the absence of the intent element of murder.

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[21]Of course, the instruction was overly favorable to petitioner because, under Indiana law, an intent to kill is not required to sustain a conviction for felony murder. *Head*, 443 N.E.2d at 50 (collecting cases). However, the issue presented by this case is whether the jury *in fact* acquitted petitioner under the instructions given in this case, not how its verdict should be interpreted had other instructions been given.

Proof of the affirmative defense of insanity is analytically distinct from proof of the intent element of a crime, though in certain circumstances the two may be related. The "existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring); *see Leland v. Oregon*, 343 U.S. 790 (1952) (state statute requiring defendant to prove insanity by preponderance of the evidence did not unconstitutionally shift the burden of proof on an element of the offense). The jury, of course, rejected both petitioner's insanity defense and any conclusion that he was guilty but mentally ill. It strains credulity to suggest, as petitioner does, that the jury nonetheless gave sufficient weight to petitioner's evidence on those theories to decide the case on a "lack of intent" ground that petitioner never even argued.[22]

Nor is it accurate for petitioner to contend that the intent element was the only disputed fact in the trial. In closing argument, defense counsel pointed out to the jury that the evidence suggested that the acts of criminal deviate conduct followed the victim's death, a point conceded by the prosecution on rebuttal. App. 25, 28. The defendant also suggested that no rape had occurred because the victim had consented to intercourse. App. 25. The jury's verdict that Schiro was guilty of murder during the course of a rape may be viewed more as an outraged rejection of his "consent" theory than as any implicit judgment with respect to intent.

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[22]Of course, in order to convict petitioner of felony murder, the jury was required to find that he could and did form the intent to rape. *See Head, supra*; J.A. 29. There is, on this record, no rational basis to distinguish between the intent to kill and the intent to rape. Indeed, petitioner's insanity evidence largely consisted of opinions that he was unable to control his sexual urges, not that he had an uncontrollable urge to kill.

Moreover, the argument made by petitioner's counsel at the penalty phase confirms that he believed the jury had found an *intentional* killing during the course of a rape:

> The statute again, I'm not going to read the whole thing to you, because the Judge will send it back with you, provides for aggravating circumstances. There is one listed in this case, and one which you may consider. And that one is that the murder was committed, was intentionally committed in the commission of rape and some other things. I assume by your verdict Friday, or Saturday, that you've probably reached that point; you've probably decided that issue. In finding him guilty of murder in the commission of rape, I'm assuming you've decided beyond a reasonable doubt that it was done in the commission of a rape, and *so that aggravating circumstance most likely exists in your mind.*

App. 31-32 (emphasis added). Thus, petitioner's counsel confined his argument to the presence of various mitigating factors. *Id.* at 32-37.

Under the facts in this record, it is clear that the jury's verdict at the guilt phase did not signify any finding that petitioner lacked the intent necessary to commit "knowing murder," as this theory was never even presented to the jury. It is equally clear that the jury's recommendation at the penalty phase did not reflect any judgment as to the absence of the "intent" element necessary for the aggravating factor, because, again, that theory was never presented to it. Thus, the jury's recommendation at the penalty phase did not "illuminate" anything, except perhaps that it took a different view of the mitigating circumstances than did the sentencing judge or was simply inclined to recommend mercy. However, this plainly presents no constitutional problem. *Spaziano v. Florida*, 468 U.S. 447 (1984).

The factual predicate for petitioner's double jeopardy and collateral estoppel claims, *i.e.*, that the jury found in his favor during the guilt phase, is simply absent. Accordingly, those claims fail.[23]

B. Deference Should Be Accorded to the Indiana Supreme Court's Findings Because They Are Fairly Supported by the Record.

Both the district court and the court of appeals were correct in relying on the Indiana Supreme Court's interpretation of the jury's verdict in this case. Respondents do not suggest, as petitioner contends, that a state court is absolutely free to define what constitutes an "acquittal" for purposes of double jeopardy law. Indeed, as noted above, this Court has expressly defined an "acquittal" as a "ruling . . . [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571. However, the determination of whether a particular ruling "actually represents a resolution" of the elements of the offense is fundamentally a factual one, to be made in the first instance by the state courts.

In the habeas context, deference to the state courts' factual findings is compelled by 28 U.S.C. §2254(d), which requires that state courts' findings of fact be "presumed correct." Findings of fact by state appellate courts are equally entitled to the presumption of correctness. *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981); *see Moran v. Burbine*, 475 U.S. 412, 417 (1986).[24] Federal courts reviewing a factual

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[23]To the extent this Court believed the facts were otherwise at the time it granted certiorari, it can, of course, dismiss the writ as improvidently granted. *Cf. Cichos, supra.*

[24]The presumption is not defeated and indeed may be stronger where federal review is based on the identical record reviewed by the state appellate court. *Sumner v. Mata*, 449 U.S. at 547; *cf. Anderson v.*

determination of what a state court jury meant must heed the state courts' factual findings on this issue.

Indeed, this Court has previously held that to do anything else would plainly overstep the appropriate bounds of federal review of state criminal convictions. *Hoag v. New Jersey*, 356 U.S. 464, 471-72 (1958). In *Hoag*, which was decided even before the enactment of § 2254(d), this Court was asked to determine that a jury's verdict acquitting a defendant of the robbery of one victim acted as a collateral estoppel bar to his trial for robbery of other victims of the same criminal incident. The Court held that the state appellate court's interpretation of a verdict in a state jury trial was conclusive, and that it would be out of keeping with principles of federalism to "overrule state courts on controverted or fairly debatable factual issues." 356 U.S. at 471. As this Court held, "For us to try to outguess the state court on this score would be wholly out of keeping with the proper discharge of our difficult and delicate responsibilities under the Fourteenth Amendment in determining whether a State has violated the Federal Constitution." *Id.* at 472.[25]

Similarly in *Cichos v. Indiana*, 385 U.S. 76 (1966), this Court relied on the Indiana Supreme Court's interpretation of a state jury verdict. Cichos was charged with one count each of reckless homicide and involuntary manslaughter. At his first trial he was found guilty of reckless homicide, which carried a lesser penalty, but he appealed and was granted a

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Bessemer City, 470 U.S. 564, 574 (1985) ("clearly erroneous" standard of Fed. R. Civ. P. 52(a) applies even when district court's findings rest on physical or documentary evidence).

[25]Thus, this Court declined to reach the issue of whether collateral estoppel was constitutionally required, an issue it later reached and answered in the affirmative in *Ashe v. Swenson*, 397 U.S. 436 (1970), because, under the state court's interpretation of the verdict, no estoppel would have arisen in any event.

new trial. At the second trial, Cichos was retried on both counts and again found guilty of reckless homicide. The conviction was affirmed and Cichos, apparently assuming that his retrial on the manslaughter count violated *Green v. United States*, 355 U.S. 184 (1957), sought and was granted a writ of certiorari on the question of whether the Double Jeopardy Clause applied to the states.[26]

The Court dismissed the writ as improvidently granted because it accepted the Indiana Supreme Court's determination that Cichos had not been acquitted of the manslaughter charge at the first trial, placing particular reliance on the fact that "the Indiana Supreme Court knew of 'the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty. . . .'" 385 U.S. at 79-80. Thus, this Court held, "we cannot accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter and that the second trial therefore placed him twice in jeopardy." *Id.* at 80.

As *Hoag* and *Cichos* demonstrate, interpretation of a state jury's verdict is a question of fact that should be left to primary determination by the state courts. The question is essentially a matter of the jury's state of mind, based on an assessment of the verdict form, instructions, evidence and arguments.[27]

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[26]At that time, the prevailing law on the applicability of the Double Jeopardy Clause to the states was *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled in pertinent part by Benton v. Maryland*, 395 U.S. 784 (1969).

[27]This Court has held that other inquiries into the state of mind of a juror are questions of fact. *Wainwright v. Witt*, 469 U.S. 412, 428-29 (1985) (excludability of juror for cause based on views on capital punishment); *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984) (juror bias from pretrial publicity); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (impact of *ex parte* communication on juror impartiality). Similarly,

Deference to the Indiana Supreme Court's interpretation of the verdict is also required because state courts are in a far better position to assess the meaning of a state jury's verdict. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985) (where issue falls between pure legal or pure factual question, fact/law determination sometimes turns on whether "one judicial actor is better positioned than another to decide the issue in question."). In the present case, much as in *Hoag* and *Cichos*, the Indiana Supreme Court, on consideration of the whole record, found that the jury's verdict that Schiro was guilty of murder during the course of a rape did not indicate that the jury had acquitted Schiro of "knowing" murder. Rather, as the Indiana Supreme Court found, "the jury chose not to consider" the felony murder count. J.A. 140.[28] Thus, far from being a "resolution" of the elements of intentional murder, the verdict in this case plainly left that matter open.

Both the district court and the court of appeals gave appropriate weight to this finding. J.A. 171; J.A. 196. Here, as in *Hoag*, this Court would overstep its constitutional bounds if it were "to try to outguess the state court on this score."[29] As in *Cichos*, the question purportedly presented by

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lower federal courts presented with a situation in which the jury's verdict is ambiguous have treated resolution as a question of fact. *Freid v. McGrath*, 135 F.2d 833, 834 (D.C. Cir. 1943) (latent error in verdict may be corrected, after taking affidavits of jurors, by district court "if convinced of that fact"); *see United States v. Dotson*, 817 F.2d 1127, 1129-30, *vacated on rehearing on other grounds*, 821 F.2d 1034 (5th Cir. 1987) (district judge telephoned jurors for clarification of verdict); *E.F. Hutton & Co. v. Arnebergh*, 775 F.2d 1061 (9th Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986) (jury reconvened to explain civil verdict).

[28]As discussed in the previous subsection, this finding is not only "fairly supported by the record" as required by 28 U.S.C. § 2254(d)(8), but is correct under any standard of review.

[29]In *Ashe v. Swenson*, this Court stated that "if collateral estoppel is embodied in [the Double Jeopardy Clause], then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact we must decide through an examination of the entire record." 397 U.S. at 442-43 (citations omitted). This statement, however, was plainly *dictum*, in that the Court was not confronted with a state court finding interpreting a jury verdict so as to not create an estoppel in any event (the situation in *Hoag*). Moreover, even on its own terms, it is unclear whether the statement was intended merely as a rejection of the "fundamental fairness" standard of *Palko v. Connecticut*, 302 U.S. 319 (1937), which the Court had recently overruled, or whether it was also intended as a statement of the standard of review that this Court should apply to state court findings. Finally, to the extent that the statement suggests that subsidiary findings of historical fact (*e.g.*, what did the jury decide), as well as the ultimate conclusions flowing from those facts (*e.g.*, the verdict creates no collateral estoppel or double jeopardy bar), are subject to independent federal review, it is inconsistent with *Miller v. Fenton*, 474 U.S. at 117, which held that, even where the ultimate conclusion (voluntariness of a confession) was subject to independent federal review, subsidiary findings of historical fact underlying that conclusion are not. Nor does such "an issue lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Id.* at 113.

the petition — whether an acquittal of an offense bars the use of some factual element of that offense at a capital sentencing proceeding — is simply not present on this record. Rather, the real dispute is whether the jury actually found in petitioner's favor on the issue of intent, a matter resolved against petitioner by the Indiana Supreme Court, whose finding is amply supported by the record.

IV. A HOLDING IN PETITIONER'S FAVOR WOULD ESTABLISH A "NEW RULE" WHICH CANNOT FORM THE BASIS FOR HABEAS CORPUS RELIEF.

Finally, this Court should not grant Schiro habeas relief on his claims because to do so would amount to the retroactive application of a "new rule." *See Teague v. Lane*,

489 U.S. 288 (1989) (plurality opinion). Adopting the *Teague* plurality's view, this Court has held that a case decided after a defendant's conviction and sentence became final may not provide the basis for federal habeas relief if it announces a "new rule." *Gilmore v. Taylor*, 508 U.S.___, 113 S. Ct. 2112, 2116 (1993).[30] Indeed, when a case comes to this Court on federal habeas review, this Court must determine "as a threshold matter" whether the relief sought by the prisoner would create a "new rule." If so, this Court will not announce such a rule in the case. *Graham v. Collins*, 506 U.S.___, 113 S. Ct. 892, 897 (1993); *Penry v. Lynaugh*, 492 U.S. 302, 313, 329 (1989).

Schiro seeks the announcement of such a "new rule" in this case.[31] As this Court has held, a "new rule" is one that was "not *dictated* by precedent existing at the time the defendant's conviction became final." *Gilmore*, 113 S. Ct. at 2116 (quoting *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (emphasis in original)):

> Because the leading purpose of federal habeas review is to "ensur[e] that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of th[ose] proceedings," we have held that "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts." This principle adheres even if those good-faith interpretations "are shown to be contrary to later decisions." Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final "would have felt compelled by existing precedent" to rule in his favor, we are barred from doing so now.

Graham v. Collins, 113 S. Ct. at 897-98 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990), and *Butler v. McKellar*, *supra*) (citations omitted; other alterations by the Court).

Schiro's position would require this Court to hold for the first time that an original capital sentencing hearing is a second "trial" of issues raised in the guilt phase, and that conviction of one equivalent theory of murder operates as an acquittal of another even where the jury was told to return only one verdict. As demonstrated in Part I above, such a holding is not "dictated" by *Bullington* and would require a radical extension of the "implied acquittal" doctrine of *Green* and *Price*. Respondents are unaware of any published case prior to 1983, when Schiro's conviction and sentence became final, that applied *Bullington*, *Green* or *Price* in such a novel manner. Therefore, it cannot be said that reasonable jurists would have felt compelled by existing precedent in 1983 to rule in Schiro's favor.

Nor do the two narrow exceptions to the "new rule" doctrine apply here. The first exception permits retroactive application of a new rule that "places a class of private conduct beyond the power of the State to proscribe, . . . or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Graham v. Collins*, 113 S. Ct. at 903. Obviously the new rule sought by Schiro would not decriminalize the killing of rape victims, nor would it prohibit imposition of capital punishment on killers of rape victims or even those found guilty of felony murder during the course of a rape.

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[30]Schiro's conviction and sentence became final under *Teague* in 1983, when this Court denied certiorari on the direct appeal, *Schiro v. Indiana*, 464 U.S. 1003 (1983). *See Graham v. Collins*, 506 U.S.___, 113 S.Ct. 892, 898 (1993); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989).

[31]Of course, a rule can be "new" even if based on a long-established constitutional guarantee such as the Double Jeopardy Clause. The test is "meaningless if applied at this level of generality." *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

Schiro's reliance on double jeopardy principles does not change the application of the first exception to the "new rule" doctrine.[32] Arguably the first exception might require retroactive application of a new rule of double jeopardy law that "prevent[s] a trial from taking place at all," *Robinson v. McNeil*, 409 U.S. 505, 509 (1973), or which bars the state "from haling a defendant into court," *Menna v. New York*, 423 U.S. 61, 62 (1975).[33]

By analogy, this Court has held that double jeopardy, like other procedural protections, is generally waived by an otherwise valid guilty plea *except* "where on the face of the record the court had no power to enter the conviction or impose the sentence." *United States v. Broce*, 488 U.S. 563, 569 (1989). In defining the exception, *id.* at 574-75, this Court relied on cases holding that the constitutional violation at issue prevented the very initiation of further proceedings against the defendant. *Menna*, *supra* (double jeopardy precluding retrial); *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (due process/prosecutorial vindictiveness).

But Schiro's new rule would not bar the state from holding a sentencing hearing at all — he does not argue that

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[32]The circuits are split on the issue of whether a new rule of double jeopardy law fits within the first *Teague* exception. *Compare United States v. Salerno*, 964 F.2d 172, 177-78 (2d Cir. 1992) (refusing retroactive application), *with Johnson v. Howard*, 963 F.2d 342, 345 (11th Cir. 1992); *McIntyre v. Trickey*, 938 F.2d 899, 903-04 (8th Cir. 1991), *vacated on other grounds sub nom. Caspari v. McIntyre*, 112 S. Ct. 1658, *on remand*, 975 F.2d 437 (1992), *cert. pending*, No. 92-1465 (pet. filed Mar. 10, 1993; *see* 62 U.S.L.W. 3033). All of these cases dealt with the now-defunct new rule of *Grady v. Corbin*, 495 U.S. 508 (1990), which was overruled in *United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849 (1993).

[33]Thus, for example, the new rule announced in *Bullington* might receive retroactive application because it wholly bars a second capital sentencing hearing where the defendant was "acquitted" of the death penalty at the first hearing.

the state was prohibited from seeking the death penalty on the basis of other aggravators — it would merely preclude redetermination of elements decided at the guilt phase. Thus, his proposed rule is in the nature of a procedural protection rather than a bar to trial, and therefore does not fall within the first exception.[34]

The second narrow exception permits retroactive application of "watershed rules of criminal procedure," those "without which likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311-14; *see Butler v. McKellar*, 494 U.S. at 416. Such rules are rare, for it is "unlikely that many such components of due process have yet to emerge." *Teague*, 489 U.S. at 313.

> A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding.

Sawyer v. Smith, 497 U.S. 227, 242 (1990) (quoting *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J. concurring) (emphasis added in *Teague*))).

The double jeopardy rule sought by Schiro is not a procedure "central to an accurate determination of *innocence or guilt*." *Teague*, 489 U.S. at 313 (emphasis added). The primary goal of double jeopardy is to prevent the "embarrassment, expense and ordeal" of a second trial. *See Green*, 355 U.S. at 187-88. Although a second trial marginally enhances the possibility that a defendant will be

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[34]In Schiro's case, of course, application of the new rule would have the effect of eliminating the only aggravator relied upon by the trial court in sentencing him to death (if there had in fact been an acquittal at the guilt phase). The Court, however, must examine the general "categorical" nature of the new rule in determining retroactivity, *see Penry*, 492 U.S. at 329-30, not its effect in an individual case.

found guilty, *id.*, accuracy is not the "central purpose" of the Double Jeopardy Clause.[35] Indeed, the Double Jeopardy Clause applies to bar a retrial of an acquitted defendant, even if the acquittal rests on an "egregiously erroneous foundation." *Martin Linen*, 430 U.S. at 571 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).[36]

Finally, this Court should refuse to announce a new rule in this case even though the respondents did not raise the new rule doctrine in the lower courts. In *Teague* itself, where the retroactivity of the petitioner's fair cross section claim had been raised only in an *amicus* brief, this Court noted that "*sua sponte* consideration of retroactivity is far from novel." *Teague*, 489 U.S. at 300 (citing *Allen v. Hardy*, 478 U.S. 255 (1986), which ruled on the retroactivity of *Batson v.*

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[35]As one court of appeals has pointed out in this context, the advantages of rehearsal and improvement of one's case on retrial accrue equally to the prosecution and the defendant. *United States v. Salerno*, 964 F.2d 172, 179 (2nd Cir. 1992).

[36]*Teague's* "central to accuracy" exception is strongly related to the "miscarriage of justice" exception reserved in habeas cases where the petitioner has abused the writ or waived an issue by procedural default. Both exceptions are based on considerations of federalism, comity and finality, as well as the historic function of habeas corpus to provide relief from unjust incarceration. Thus, the *Teague* plurality cited *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), and *Murray v. Carrier*, 477 U.S. 478, 496 (1986), in fashioning the second exception to the "new rule" doctrine. *Teague*, 489 U.S. at 313. Those cases make it clear that "actual innocence" is the focus of the inquiry. At no point in this case has Schiro made a colorable claim that he is "actually innocent" of the death penalty. *Cf. Sawyer v. Whitley*, 505 U.S. ___, 112 S. Ct. 2514, 2517 (1992) (one is "actually innocent" of death penalty only if clear and convincing evidence shows that, but for the alleged error, no reasonable fact finder could find him eligibility for penalty). The evidence in this case leaves no doubt that Schiro purposely killed his victim to prevent her from reporting the rape. Schiro's insanity defense was rejected by the jury and the trial judge. Thus he cannot establish that the accuracy of the trial court's finding that he intentionally killed the victim would be affected by the newly announced rule he seeks.

Kentucky, 476 U.S. 79 (1986), even though the question was not presented in the petition for certiorari or addressed by the lower courts).

As noted above, the "new rule" doctrine is deeply rooted in the important considerations of comity, federalism and finality attendant to all collateral review of state judgments. *Teague*, 489 U.S. at 305-10; *see Butler v. McKellar*, 494 U.S. at 412-14; *Gilmore v. Taylor*, 113 S. Ct. at 2116 (new rule principle "effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts."). It is thus analogous to other nonjurisdictional, comity-based rules that this Court may consider *sua sponte*. *See Granberry v. Greer*, 481 U.S. 129 (1987) (exhaustion of state remedies); *Younger v. Harris*, 401 U.S. 37, 40-41 (1971) (abstention); *cf. Schlesinger v. Councilman*, 420 U.S. 738, 743-44 (1975) (exhaustion of military administrative remedies).

In this case Schiro did not even *raise* his double jeopardy or collateral estoppel claims until his second state petition for postconviction relief, though the claims were plainly available on direct appeal.[37] Even then, and at every subsequent level, they were only one of many issues raised and briefed by him. They were never briefed at length or with clarity; the court of appeals did not even perceive that a separate collateral estoppel claim had been made. (J.A. 196-97 n.7.) The respondents consistently argued that the issue was controlled by a Seventh Circuit decision, *United States ex*

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[37]Schiro's failure to raise his double jeopardy claim until his *second* state postconviction relief petition does not act as an absolute bar to this Court's consideration because the Indiana Supreme Court ruled on the merits of that claim. *E.g., Harris v. Reed*, 489 U.S. 255, 261 (1989). However, that failure is certainly relevant to concerns of finality and comity that form the calculus of whether the new rule Schiro seeks should be applied to collaterally attack the Indiana Supreme Court's judgment.

rel. Young v. Lane, 768 F.2d 834 (7th Cir.), *cert. denied*, 474 U.S. 951 (1985), and both the district court and court of appeals agreed. (J.A. 171, 196).

It was not until the case was presented to this Court that it became clear that Schiro is seeking the announcement of a new rule. Now that this is apparent, this Court should effectuate the policies underlying *Teague* and refuse to announce such a rule in this habeas corpus case.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals affirming the denial of the writ of habeas corpus should be affirmed.

Respectfully submitted,

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APPENDIX A

TRANSCRIPT OF FINAL ARGUMENTS AT THE GUILT PHASE

MR. ATKINSON: Thank you. If it please the Court, ladies and gentlemen of the jury, Mr. Keating: My style, as I told you when I first spoke to you at the beginning of this trial, is not to say a lot. My function in this trial is to produce for you evidence from which you can make a judgment. The prosecutor has a duty under the law to prosecute the guilty and to protect the innocent, and I feel that sometimes it's inappropriate for me to go to great lengths to persuade anybody as to any particular version of anything. However, in the conduct of a trial you do have two sides ably represented by counsel, and in the theory of justice that we have, if we have twelve impartial people, who are selected on the basis of their freedom from prejudice, and their commitment to doing justice, the theory goes that if each side is ably represented there is a collision, a crashing together of forensic combat, a war of sorts, from which conflict you can somehow sort out truth and justice, and that necessarily then brings me to just not producing the evidence and letting the evidence do the talking, which I do, but also at the end of a trial I attempt to call your attention to some things that maybe you've overlooked, or maybe you haven't considered, or maybe aren't fit right together into a perspective in your mind. It's not my intention to tell you what to do. It should not be the intention of anyone involved in the trial process to invade your province. You now have the serious part of the case to deal with, and that's sorting it out and deciding what to do with it. That's yours alone. The responsibility belongs not to the Judge or Mr. Keating or I, and along these lines, only to illustrate to you the way the evidence may fit together, I would make some observations. We have here maybe almost

a confession of, I did it. I remember Mr. Keating saying that you might find reasonable doubt as to whether or not the Defendant Thomas Schiro is guilty of the offense charged, that the State might fail to carry its burden of proof. We now at the other end of the trial process find out that there isn't really much serious contention about whether or not Laura Luebbehusen died at the hands of Mr. Schiro. Uh, we do, however, have a couple of serious controversies that you have to sort out. The first one is, what really did happen out there? What can you believe? All of it that we have, directly or indirectly, other than the physical evidence itself is within the control of Mr. Schiro. He made a statement to Ken Hood. He said to Ken Hood, uh, I killed the girl. I stole her car. I drove it back here by the half-way house. Uh, I did it. It's heavy, I can't handle it. It's a responsibility that's eating away at me. I'm upset and nervous, whatever. He admitted no detail. He told his lady in Vincennes, Mary Lee, that he had done it also. He didn't tell her right away. He was nervous, he was upset, he was worried about it and he shared it with her. Mary Lee's reaction, if you'll recall, is that she didn't tell anybody. They had discussions about it, uh, they discussed it, and he told her a version of what happened. Uh, you heard from Dr. Osanka. Dr. Osanka, sitting up there in that chair, uh, told us things that Mr. Schiro had told him after hours and hours, I think it was fifty hours at a hundred dollars an hour, of conversations and interviews, plus all these other activities, Mr. Schiro kept telling him more things and more things and more things. This is, again, all after the event. My humble suggestion to you is that evidence within the control of someone who is seeking to avoid the responsibility for that harm which he has caused may be suspect. The best evidence you have in this case, to my way of thinking, is in that box that came from the crime scene that's not within the control of the manipulative acts of Mr. Schiro. What do we have? Well, we have Mr. Schiro's coat on which there is blood consistent with that of Laura

Luebbehusen, which blood is not consistent with the blood of Mr. Schiro. We have that. There were no fingerprints. That is something, you might say, well, gee, they don't have any fingerprints, they can't link the crime to Mr. Schiro. That's not quite true, because if you recall what Mary T. Lee told us, Mary Lee told us that he was wearing gloves. She took those gloves, not originally to the police, but she took those gloves and cut them up into little bitty pieces and washed them, because they had blood on them. It was only after the police found Mary Lee that she did anything in furtherance of her civic responsibilities, she gave them a statement because they were there, a signed statement, and she told them, at that time, what Thomas Schiro had told to her. You need to understand on that statement, apparently she's looking to protect Mr. Schiro here also. Why would I say such a thing? Well, I remember her testifying, I remember her testimony well, I remember her state of agitation as she told of the bad things that Mr. Schiro did in that house. I remember how she became more relaxed and calmed down when she talked with Mr. Keating. She talked about the same kinds of things that Mr. Osanka told us about. Mr. Osanka, you will recall, is the professional witness who was getting a hundred dollars an hour for his activity. Yeah, well, O.K., I had a professional witness too, and I assume that I'm probably going to get charged about as much, but at least I don't have fifty hours worth invested. But, interestingly enough, when Mary Lee got back to something she understood, and was willing to say, she settled down, she calmed down and she went right along with the program. A very creditable performance, a very convincing performance. I kind of even accepted a lot of it myself. Until I said, how many times did you visit with, uh, Frank Osanka? One time. No, no, really how many times did you have conversations or talk, visit with Frank Osanka . . .

MR. KEATING: To which the defendant would object, your Honor. I hate to interrupt . . .

MR. ATKINSON: Certainly, go ahead.

MR. KEATING: . . . but, that question was not asked. How many times did you talk with, have conversations with.

THE COURT: The question was proper . . . how many times did you see Dr. Osanka, and the answer was once, I believe.

MR. KEATING: O.K.

MR. ATKINSON: Well, she answered on more than one occasion. She answered it on more than one occasion. I asked the question again probing for more information. I'm sure counselor will allow me that. And, at that point, she said, one time. Dr. Osanka testified that he had sixteen hours worth of communication. Now I can almost count on Mr. Keating getting up here and saying, oh, hey, really that doesn't-make any difference, there was ambiguity in what that lawyer said, that prosecutor, that nasty guy, uh, he didn't frame his question carefully enough. Well, I submit to you that the lady showed how candid she was, and she showed where she was from when she didn't tell this jury that's going to decide this, that there were sixteen hours worth of conduct . . . contact, that there was a telephone put in, apparently at Mr. Osanka's own expense, uh, at that time, I suspect he'll be reimbursed. She didn't bother to tell us about the tape recording, and she didn't tell us about the intensive nature of those communications and how it was that she got her presentation put together. Well, back to Mary Lee. What can you count on from Mary Lee? You can count on from Mary Lee some element of truth in that which Mr. Schiro told her about the crime. What you can't count on, and even Mr. Osanka understood that you wouldn't buy it all. What you can't count on is Thomas Schiro having told her, for that first statement to the police to be accurate, all of the things that

happened in the house, because understand he's going back to his lady, his loved one, the person with whom he resides, the person upon whom he was dependent for a sexual relationship, the person that obviously he has some feelings for, any way you want to play it, he obviously has some feelings for, he's not going to go back and tell her exactly what he did when the physical evidence shows that he did something different than have a consensual cooperative liaison with a lady who at first really didn't want to go along with it, then maybe, you know, they did, and they became friends, and they went out, they drank, and . . . where's that bartender that sold that beer?

MR. KEATING: To which we would object, your Honor. That is a direct comment on the defendant's failure to produce evidence. Defendant has no burden to produce any evidence . . .

THE COURT: Under no . . . I will state strongly that defendant has no burden to put any evidence whatsoever in here and he is innocent until proven guilty

MR. ATKINSON: That is absolutely correct. My apologies.

THE COURT: Alright. Ignore any other statements to that effect. You may continue.

MR. ATKINSON: In any event, what is Mr. Schiro going to do? Is he going to go back to his lady, to his loved one and say, well, I went and I knocked on the door, and I said my car was broken down, and I got in the house, and she was wearing a robe, and I hit her, and knocked her out, and she fell on the bed where the blood pooled? You see, Dr. Venable's testified that there was a blow severe enough to cause a loss of consciousness. John Althoff testified that the individual was . . . Laura Luebbehusen was on the bed for a period of minutes for the pooling of blood to occur on that

pillow case. What's he going to do, say that, after I knocked her out, and had my way with her I fell asleep, and when I woke up she had clothes on and was headed out the door and it scared me so I killed her? He had to make it more acceptable somehow, and I suggest to you that his pattern of minimizing things is throughout this whole trial. He minimizes them by saying, I'm sick. He minimizes them by saying, I need help. He minimizes them by, as . . . he manipulated his parents by manipulating whoever it is that he's in contact with. With Mary Lee, I suggest to you, that he minimized what really happened there by bringing it within a framework that she could handle. Hard to believe, but apparently what she could handle from Thomas Schiro was a whole lot of weird. She accepted a lot of behavior of Mr. Schiro, and so maybe she can commiserate with him about sexual things because she already knows he's kinky, she's already accepted that, she still remained within the relationship, and so she can probably handle the kinky sex aspect easier than him going in and killing and striking without any familiarity, O.K.? You don't have to accept any theory I have. I just invite you to look at the physical evidence. The physical evidence is, after a pooling of blood on the pillow case, on the bed, there was a second attack. John Althoff tells us that it was a second attack because there was blood and grab marks on the front of that little peach colored robe. John Althoff tells us that the second infliction of damage is evidenced from the blood on the wall, that she was driven into the corner and repeatedly beaten until she died in the corner, and was then drug out of that room into another room. That matches up with some of what we've been told by Mary Lee. She was wearing different clothing. There had to be a second assault. There had to be time for her to change clothes somewhere. There are missing underpants, physical evidence. They've got an explanation for it. I heard it. Dr. Osanka said that, uh, Mr. Schiro stole her underpants. Another plausible consistent with physical evidence description of what might have

happened, would be that the lady was in a hurry. She came to, she wiped her face on that towel to get the blood out of her face, grabbed the closest clothing nearby, including her roommate's coat that she never wore, grabbed a pair of pants and put them on. It was cold outside, she had to put some shoes on, and split. That's not necessarily what happened, but it is consistent with the evidence in this case, the physical evidence, evidence not within the control of Mr. Schiro. Well, what else do we have? We have a bottle, or what's left of one. We have a shattered bottle. We have an iron, a broken iron. We have a mark in the head of the young lady that matches up with a portion of the iron, and we have a dildo that was recovered, a dildo that was recovered with phos . . . can't say the word, phosphatase on the inside of it. The lady was about to have her period. Dr. Venable's told us she had a ruptured something luteum, corpus luteum, I think it is, which meant that she had just ovulated, that she had just sent an egg on the way. In other words, this was a time when she would be more fertile than other times. It's not unreasonable to assume that the dildo first got introduced into this occasion by this young lady begging, oh, please, please don't. And, when it became clear that it was going to happen, no matter what, she said, please, please don't make me pregnant. Here, don't you have anything to use? No, I don't have anything to use. Well, I've got something, please. That's an explanation. It may not be what happened, but it's consistent with the physical evidence. We have some evidence that it was not a consensual affair, O.K.? If it was consensual, why would there be a note? Excuse me, I want to get it right. If it were consensual, if it were consensual sex, and that's important because for it to have been a rape, it couldn't be consensual. This is not the death penalty phase of this trial, alright? It takes two steps. You first find whether he is guilty or not. If he's found to be guilty of Count Two, or of Count Three. . .

MR. KEATING: Your Honor, we're going to object to him explaining to them under which circumstances they may move on to the death penalty portion. I don't think that that should enter into their consideration here . . .

MR. ATKINSON: Nor should the fact that if they find that he is guilty here, uh, enter into their consideration as to whether or not there's a death penalty. They're entitled to know, Judge

THE COURT: The instruction, one of the possible verdicts, is Murder by rape, one is Murder by deviant conduct, and one is Murder

MR. ATKINSON: I think they're entitled to know. Would you step up to the . . .

THE COURT: Yes . . . you can use . . .
(CONVERSATION BEFORE THE BENCH BY ATTORNEYS)

THE COURT: Alright. You may proceed, and . . .

MR. ATKINSON: In the simplest form, if you vote for a conviction in this part of the trial, it does not automatically impose the death penalty. You get to determine at another time, another hearing subsequent to your finding on the question of guilt or innocence on any count, you get to determine what penalty gets applied, not on the question of guilt or innocence. What we're dealing with at this stage of the trial is whether this man is guilty or not, and if he is guilty, what is he guilty of, alright? If there is no conviction, I'm sorry, if there is no consent, then you may find defendant to be guilty of rape, murder. If there is no consent to deviant conduct, you may find the defendant to be guilty of Deviant Conduct Murder. The reason this note is of a lot of

importance is, it tells us there wasn't any consent. Consent is a defense to the rape part, consent is a defense to the deviant part. Darlene, don't come in, please, I've called the police. That pretty well destroys any idea of consent. Why else would she call the police, other than she didn't consent? We have physical evidence of a car being transported, near the half-way house where Mr. Schiro lives. We have physical evidence of shorts and underwear, in addition to his coat, shorts and a washcloth, with seminal stains on them, from his room. We have, uh, bite swabs, physical evidence that shows the presence of saliva from the nipple or the thigh, and I honestly can't remember which, or if it was both. Some of you do, some of you know, you had a chance to listen to all of the evidence. I had work to do, and didn't maybe get all of my notes right. The point is this, there is physical evidence that supports the fact that this defendant committed this crime. That gets us into a whole new ball game. Once the crime is established beyond a reasonable doubt, if you find that, you still have to struggle with whether or not this defendant should be excused, whether he should be freed from responsibility, by reason of being insane, not medically sick, or mentally insane, uh, within a treatment context, but within the legal definition of insanity. I think we've pretty well established both sides here, what that ball park is, but a couple of things to note in passing; the test is, could he tell the difference between right and wrong? Well, we have, uh, we have Ken Hood, we have Bob Wilkinson, the counselor, we have Dr. Abendroth, we have the probation officer, we have, uh, two court appointed psychiatrists, who are medical doctors, all saying, without any fail, that Mr. Schiro could tell the difference between right and wrong; he was capable of conforming his conduct to the requirements of law, at the time this offense occurred. Doctors testified as to the time of offense. The other people testified as to the time they knew him, while his employer told us he was rational, told us that he didn't have any trouble verbalizing, told us that his work

was good. The people around Mr. Schiro, with only one exception, the people around Mr. Schiro, with only one exception, said that he was competent, that he was legally responsible, if you want to attach significance to what they said. Mr. Schiro, Senior, didn't have that much light to shed on the subject. Mary T. Lee testified just like railroad tracks with Mr. Osanka. Mr. Osanka told you that in his opinion, and I think these words are magical, in Mr. Osanka's opinion that what he found out in all of that time was consistent with a definition. Mr. Osanka is not a psychiatrist; Mr. Osanka is not a physician; Mr. Osanka is not involved in treating mentally ill people; Mr. Osanka is not in a practice that has a substantial amount of consultation to it. Mr. Osanka is a witness and a public speaker. Dr. Crane did all he could, and he said that the defendant was sane. Dr. Crudden did all he said he had to do. He's been there before; he's made a lifetime of psychiatry; he said the defendant is sane, and when I'm using that word now, sane, I'm talking about legally sane. Dr. Abendroth, who counseled with him over a period of time, found no indication that he didn't know the difference between right and wrong, and found no indication that he couldn't conform his conduct to the requirements of law. Well, is there anything else out there in this case that should suggest to you that Mr. Schiro should be relieved from the consequences of his acts? Well, yes, there's one more shred of evidence, aside from Osanka and Mary Lee, and that's a fellow by the name of Donnerstein, who teaches somewhere, and does experiments. He didn't talk with Thomas Schiro, neither did Dr. Crane, uh, he had access to some tapes of things prepared by Dr. Osanka. Uh, he told us that somehow or another, looking at pornography made Thomas Schiro do aggressive things, and somehow or another got a different definition of sex and right and wrong, and to Thomas Schiro it was O.K. to go out and do those things to people. He recognized that society had a different, a different definition of right and wrong, but he just couldn't bring himself to

conform with it. I think that says something about Dr. Donnerstein's testimony. Uh, when it's all said and done though, you can't just rely upon what one conclusion from one witness, or two conclusions from two witnesses might establish, O.K.? I think you have to go beyond that; you have to look at those things which would cause you to believe whether Mr. Schiro is, uh, legally sane or not. And, the way you do that, I think, is to look for his knowledge of right from wrong. Did he run? Well, yes, he did. . . . in this case. Did he flee from the crime scene? Did he take her car? Did he stick around, did he go to sleep in there? Did he call the police and say, hey, what have I done? According to all that you have heard, what happened was that Mr. Schiro left, he didn't tell anybody, that recognizes . . . you know, for a day or two. That recognizes, I think, or sets up that he recognizes the difference between right and wrong, what he's done. Uh, he went off to see Mary, and told her he didn't want to tell Ken, Ken Hood, because . . . he's the last person I want to tell. All along here we've got a pattern of avoidance of responsibility. If he didn't know he had responsibility, he wouldn't avoid it. One curious thing in this regard, Dr. Osanka said, up there on the stand, in response to Mr. Keating's question, would this crime have occurred if there had been a policeman at, I think Mr. Keating said, at the defendant's armpit, elbow, armpit, makes no difference. Uh, Dr. Osanka said, I think he would have taken the policeman out, and then he'd have gone ahead and done it. Well, you see, if this man were mentally ill, suffering from an irresistible impulse, and he didn't know right from wrong, he wouldn't have had to take out the policeman, because the policeman wouldn't have made any difference; he'd have done it right there in front of the police officer; it wouldn't have made any difference. It's like the guy that puts his arm up, it doesn't matter whether he's talking to his psychiatrist, doesn't matter whether he's talking to his mother or a nurse, or some guy on the street, he's got a delusion he's got to carry his arm around like that, or he'll

lose it . . . doesn't make any difference who sees it. You don't have to take out the doctor. It's just there, it's a reality. Dr. Osanka recognized that Tom Schiro had a view of reality that would necessitate taking out the authority figure before he could go ahead with it because it was wrong. What else? He went to his job, he said, I'm going to quit, I'm going to leave town, . . . come back Monday and give you ten bucks I owe you, getting ready for flight . . . flight from what? Flight from the wrong he'd done that he knew was wrong. Peeping. He didn't walk up and stand in the window and peer in at somebody and wave at them because he was doing right things, he hid. He knew it was wrong. God forgive me. Forgive me for what? For something that's wrong. You have to admit this guy, if he did all those rapes that he told about, o.k? You have to admit that he had to be careful, or he wouldn't have gotten away with them. If you're careful then you've got to know that you're doing something that's not going to be approved of, because it makes a difference. He picks out anybody, doesn't make any difference . . . ah, there's one, I want sex with that one, and goes up on the street corner and has sex with somebody on a street corner . . . that's delusional, because he doesn't know he's doing anything wrong. If he sneaks around and comes in at night, if he checks someplace out, he goes into this home for example, the Laura Luebbehusen home, first thing he does, he says, oh, may I use your phone. He walks in and looks around and makes sure that nobody is there. Not being completely convinced he asks to use the bathroom, and really sorts it out, that there's nobody there. Nobody there to catch him; nobody there to stop him . . . because what he's doing there is wrong. There's also that same pattern of withholding details, recognition of the wrongfulness of the behavior. When he told Mary Lee, he told her a story, you can find how much of it you wish to believe, and how much of it you don't. When he talked with Walter Abendroth, a person who testified he was in a position of trust and confidence with Mr. Schiro, he

wouldn't tell Abendroth. When we get down to Ken Hood, he wouldn't tell Ken Hood details about the crime. Oh, my, it was too awful. When he talked to the psychiatrist, he said, here's my autobiography. Everything you need is in there. He wouldn't tell them any details about the crime. He wouldn't give them any evidence of his wrongdoing, you see. Well, I heard that Thomas Schiro trusted people who were doctors, and distrusted law enforcement. If that's true, if that's a part of his delusional system, why didn't he give the details to the doctors? Surprise, surprise, the autobiography does not contain anything about the crime. No way the doctor could know. Now, you know, he didn't get the job done with the thirty-seven pager, because he forgot to put in the part about the mannekin, so then he came back with the part about the two pager part, and that way we've got two documents, and we've got the whole story. Dr. Venables told us that Laura Luebbehusen had a broken fingernail, a bite mark on the left nipple, a bite mark on the right thigh, ostensible bite marks, he called them. Dr. Brown connected that up for us, a tear in the vaginal track, or in the vagina that was consistent with the insertion of some object, uh, four contusions or lacerations on the head, a contusion on the neck, indicated that the wounds to the head were from blows, as opposed to falling, and that she'd died of strangulation. He also told us that she had a ruptured corpus luteum, I guess I was right. We put on some evidence about Darlene Hooper. We put on some evidence about where she was, where she came from, where she went, where she spent the night, followed her through from the time she got off work. At the beginning of the trial, there was a note there where they'd had some kind of a disagreement, but, uh, that was over, and Darlene Hooper told us, again on the question of consent, that Laura Luebbehusen was a practicing lesbian, that the dildos in the house were not for use on Laura, that they were for use by Laura, for the benefit of Darlene Hooper. She told us that Laura was repulsed by the idea of sex with a man. She told us also that Mr. Schiro

was a stranger. With respect to the mental condition, I made some notes, I'll share them with you. I've probably said to you already what I think about this, in an abbreviated form, but I'll take you through a step at a time. Kenneth Hood told us, he's the director of the half-way house, told us that he thought that Mr. Schiro needed drug and alcohol therapy, said he was rational. He said he was nervous, of course, nervous, very nervous and agitated, calmed down as he began to tell it, but otherwise he was rational. He could talk, communicate. Robert Williamson, the counselor of Mr. Schiro, another guy in a position of trust and confidence, you know, took him to the bus station, rode with him in the car, talked with him. . . . indicated that he got along O.K. with the guys. This is a fellow that doesn't have any friends, you see, got along O.K. with the guys, he didn't have any close friends at the half-way house, but had some arrangements or relationships outside. He had a positive view of his parents . . . . did mention bondage, "b" and "d", I don't remember what the "d" part is, but bondage, on one occasion. Never mentioned peeping or anything like that, said he was rational, said he cleaned up a lot since he saw him last. Bob Wheeler was his employer, said he was a good worker, and he'd never smelled alcohol on his breath. Two and a half months he had a chance to observe him; said he did know the difference between right and wrong, could conform his conduct to the requirements of law. Dr. Abendroth read us a lettter, a letter that Dr. Abendroth didn't know was going to help Tom, with respect to the avoidance of responsibility. In fact, Dr. Abendroth set up ground rules; I'll see you, I'll talk with you, I'll get along with you here in this counseling program only if you understand I won't do anything to get you out of trouble. Dr. Abendroth wrote a letter, the letter is significant because it shows, without any reference to this trial, what Dr. Abendroth thought about the mental condition or mental state of Thomas Schiro. That's probably worth touching on for a moment. Tom has been able to work on the changes he needs to make,

for example, he's trying to develop new ways of communicating with his parents and girlfriend, attempting to overcome shyness, develop new friends, asserting himself, saying "no" to old acquaintances that want him to smoke pot or drink booze; we talked about possible educational goals; been interviewing for jobs. I believe Tom is developing insights regarding his past behavior that are helping him to understand himself and his feelings. Needless to say, I am proud of the movement that Tom has made in the last several months. As I'm sure you're aware of, Tom has been scared since this episode with the law. I believe it's causing Tom to examine his lifestyle and to decide to find ways of behaving that are not self destructive or destructive to others. If Dr. Abendroth had found, his testimony was, if he had found any indication of schizophrenia if held have found any indication of mental illness, he would have referred Tom to people who could do with him what needed to be done, who could deal with that. He wasn't equipped for it, he was primarily a counselor doing counseling, uh, to the community on a limited basis. His occupation there was as a counselor for people on campus, but he was doing public work as well. He said, I found no indication that he couldn't tell right from wrong, that he couldn't conform his conduct, no indication of mental illness. Dr. Crudden, Dr. Woods, Dr. Crane, all testified. There was nothing delusional there. There is no symptomology, there's no evidence of a psychotic state. There's nothing about his mental condition that should excuse him from the consequences of this crime. I think what I'll do next in the spirit of being very brief, is to allow Mr. Keating to make some comments. Then I will respond to them. I will, uh, reserve, if it please the Court, the opportunity to show one exhibit to the jury.

THE COURT: Fine.

MR. KEATING: May it please the Court, Mr. Atkinson,

ladies and gentlemen of the jury: I, as well, hope I will not be too long, for two reasons. I think you have probably had your fill of mental health professionals, psychologists and psychiatrists, and I'm sure the last you want to hear are a couple of lawyers preaching to you. And, there's a second reason I'm going to be brief. I have caught Mrs. Johnson's cold, so, I'm going to have to cut it short here, because I'm having a lot of trouble breathing. But, what I want to do . . . I don't want to review the evidence with you. You folks have sat here . . . you're all intelligent people, and you heard the same things I did. You heard the same things Mr. Atkinson did. In fact, and I think I've finally figured it out; see, we sit on one side of the witness and he sits on the other. We hear things at an angle, because I didn't hear some of the things he heard, and he heard them differently than I did, and I think maybe that's why you people are in the middle, so maybe you can hear them correctly. So, I'm not going to go over all the evidence with you. The things I did hear, and I'm a little different than Mr. Atkinson. I'll just briefly state, I thought Mr. Osanka was also a doctor. I didn't know if it was Dr. Abendroth and Mr. Osanka, but . . . again, you know, we're on the side, you're in the middle. And, I heard him say that Mary T. Lee didn't do anything until the police showed up. I thought I heard, and again, you people are in the middle, you didn't hear it on an angle, but I thought there was testimony of how she called Dr. Abendroth and some other things that she had done, and I heard Mr. Atkinson go on and tell you why she isn't a good person to believe, and why her word should not go, and why you shouldn't pay any attention to her, and how she's really out to help Tom, she still secretly loves him. Well, I know we heard this, but I also saw the pain on her face when she talked about Willy, and remember, she didn't find out about all this until all this had happened. She did not know what was being done to Willy. And, I saw the pain on her face. Is that the kind of person that's going to lie to help somebody, after what was done? I also heard a girl

that hasn't had a drink for a year, after being an admitted alcoholic. But, I'm not going to dwell, and I'm not going to sit here and tell you how I heard things differently, because you probably heard them correctly. What I am going to do is just maybe give you, like Mr. Atkinson, maybe a few things to think about. The thing I'd like to maybe do is suggest how you should go about your deliberations. Now, I'm no expert on this. I don't know any better than you all do, but, you'll have to go back there and try to figure out which one of eight or ten verdicts, I believe there are ten, that you will return back into this Court, and I believe the Judge will explain every one of them to you, and instruct you on them. And, I think perhaps the best way, maybe you can go about this, is take these issues one at a time, because there's a logical sequence, I think, to them. I think first of all what you ought to do is sit down and decide the issue of insanity, because depending on that, you may just stop there or go on. Now, the Judge will instruct you on this, but I'm going to read it because I want to maybe talk to you a little bit about it. It says that a person is not responsible for having engaged in prohibitive conduct, committed a crime, if, as a result of a mental disease or defect he lacks substantial capacity to either appreciate the wrongfulness, appreciate the wrongfulness of the conduct or conform his conduct to the requirements of law. Now, let's look at those things one at a time. It's by a preponderance of the evidence, that issue. Is it more likely true than not that he was insane? Have the scales tipped ever so slightly one way or another on that issue? A preponderance of the evidence. In that definition I heard no mention of DSM. I heard no mention of psychosis. I heard no mention of any of these other terms we've all been arguing about as to what they mean, and all the green books we've had out, all the pages we've read. The DSM, I think Dr. Crane is right, probably very few people refer to it until they come into Court, and apparently we all bring it, including the Prosecutor, but all that is is so psychiatrists and psychologists can talk to one

another, they can talk among themselves. When one of them says, this person is suffering from whatever, then it's generally understood what that is. It's no bible. It's no bible that helps you determine what is mental disease or mental defect. You are the judges of that. You are the jury. You determine what is a mental disease and what is a mental defect, and you have to determine, based on what you've heard, whether or not a mental disease or a mental defect is present. Not the DSM, not all the experts, you. The Judge will instruct you on mental disease and mental defects, and you'll hear this again, but I'll read it. The term mental disease is generally used to denote a condition capable of either improving or deteriorating, and the term mental defect generally is used to denote a condition which is not considered capable of either improving or deteriorating, and which may be either congenital, or the result of an injury, or the residual effect of a physical or mental disease. So, that's what the Court will tell you about that term. You are the ultimate judges. What is important is not what we label it, what the symptoms are called, what we can look in a book and point to something. The important thing is whether or not the symptoms exist, whether or not there is evidence of a mental disease or defect. And, do they exist? Well, where do we start? A good place to start in determining whether or not there's a mental disease or defect is with the crime. What do we have then? We have a violent assault, very violent, a very brutal assault upon a woman, and if that weren't enough, what else do we have. We have, after death, I'm not even going to go into it all, but you know what I'm talking about. After death, you saw the picture of the body. Someone, after death, sexually abused that body. Now, we start from there. Is that normal? For crying out loud, is that normal activity? Is that the kind of thing that a normal person does? We start with a crime, and from there where do we go? Well, we go over to Tom Schiro and what do we find? We find a twenty year old, twenty years old, just out of his teens, a high school

dropout, with limited social experience, limited job performance. And, then, and this is a person right here, this twenty year old dropout, that the Prosecutor would like you to believe is pulling the scam. He's a person the Prosecutor would like you to believe, got experts in here from Wisconsin and Evansville, experts from Illinois who made fools of themselves by all this stuff, because he's outwitting them all. This twenty year old high school dropout is putting it over on us all, and he's manipulating us. He's manipulating the doctors and he's manipulating everyone here, and they want you to believe he's trying to manipulate you. They want you to believe you're being manipulated, and they want you to believe it's a scam. Well, is it a scam? Somebody pulling something over somebody's eyes? Right over here sits Mr. Schiro. His wife has been in the Courtroom, they have been available. Who talked to them? Who talked to his parents? Who talked to the people who raised him and attempted . . . in attempting to determine whether or not this man could appreciate the wrongfulness of his conduct, conform his conduct? Who talked to them first? Who spent fifty dollars [sic.] on interview with him? Not an hour and a half, not an hour, reading over an autobiography, who spent fifty dollars [sic.] on interviews? Who talked to Mary Lee? Mary Lee was a prosecution witness. Mary Lee was called by the State of Indiana. They had to know where she was. She's always been there. They could have talked to her just pick up the phone, she seemed quite eager to talk. Say, Mary Lee, I'd like to talk to you, about Tom. Do you know anything that could be important? They could have done that? And, who did it? Who had to do it? Well, the Prosecutor, on voir dire, I remember, asked someone, I don't know if it was anyone on this jury, but, said, do you believe that maybe you know more about your wife than any . . . her doctor would, because you live with her? I remember him asking that question. Who knows more about Tom than the person he lived with? She was there. She was available, no one talked to her. No one

bothered checking anything out, what did they . . . do and said. Well, they got angry because they . . . well not angry, maybe, but a little perturbed because he was talking faster then they could write, they couldn't get it all down. So, they brought him in in manacles, and said, O.K. open up to the . . . tell me everything I should know. And, they gave hour interviews and they gave an hour and fifteen minute interviews. And, now, they come into Court and they say, no, nothing wrong with him. Nothing wrong with him at all. I know because I did plenty of work. They didn't talk to the people who had the most information. The prosecutor wants you to think, the prosecutor asked ,you to believe that that's part of the scam too. But, they were there, they could have talked to him early. They even brought one as a witness. They said, Tom Schiro is . . . he's not insane, he's a manipulator. I think you people are the ones being manipulated here, and not by him. You're being asked to excuse poor work because a person is a medical doctor. You're being asked to overlook what should have been done because a man has M.D. behind his name. Now, you and I wouldn't get that kind of break, but they're asking you to give a person that kind of break. They're saying, well, we ought to accept his opinions. He is an M.D., and he must know more. Well, sure he may know more about medicine, but all the knowledge in the world doesn't substitute going out and getting the facts. But, they're asking you to rely on those opinions. And, Dr. Osanka, I think it is Dr. Osanka, is not infallible, of course not. We're talking about opinions here, opinions of mortal men. Let's check out the background, compare what has been done in both cases. And, don't accept anyone's opinion, don't accept any expert's opinion, but use them. And, use them as you feel they are believable. The second part of that test is whether or not he could appreciate the wrongfulness of his conduct, and not whether or not he could, whether or not he lacked the substantial capacity to do it. Did the Defendant lack the

substantial capacity to appreciate the wrongfulness of his conduct? Dr. Osanka, Dr. Donnerstein said, the pattern is clear, premature exposure to pornography and continual use with more violent forms created one thing, created a person who no longer distinguishes between violence and rape, or violence and sex. I think Dr. Donnerstein testified that something Tom said on one of the tapes, rape is sex. There's no distinction there. Violence is sex. Violence in some of the most . . . honestly disgusting forms, is sexually arousing to him. Rape is sex. Violence is sex. It's a result of pornography addiction. Mary Lee described it as the same as breathing to him. Some of you women may feel somewhat threatened by this case, and I think you should for this very one reason. I think the evidence shows there are one or two movies out there that could directly endanger your safety; I really do. But, that's really not what we're here to decide. We're here to decide what effect it had on Thomas Schiro. And, I think as far as that goes, the appreciation of the wrongfulness of his conduct, is from my side, from my angle, is pretty clear. He could not appreciate the wrongfulness because to him it was not wrong. His mind was to the point, his values were to the point where there was no distinction there. That's a hard thing to accept. I think even Dr. Osanka was honest enough to say, that's a hard thing to say. Because maybe he did know what society says, but read the insanity statute and read the text. The third part is whether or not it is more likely true that he could not conform his conduct to the requirements of the law. You heard, and I think no one even has to tell you this, there was a sexual pressure inside of him. It started, and it grew, and it was fed by pornography, and it was fed by alcohol, and it was fed by drugs, and it had to be released. It had to be released. And, how the masturbation, and I'm not talking about what we all think about masturbation, although that happened also. He used people to masturbate. Mary Lee, again the person who should know him best, said, testified as to his sexual technique. She said,

she felt like his "jackoff" machine. He used people to masturbate and finally he used the ultimate form, and that was a dead body. He could not control himself. His sexual urge had to be released. It had to be gotten over with, and the way to do that was through, in his mind, various forms of masturbation. To us, a lot of it is very disgusting, violent assault against people. To him it was masturbation to relieve his sexual pressure. He could not control, could not control. Mary Lee testified masturbation to him, again, was like breathing. He had to have his sex. There were times before when he was out raping every night, he was home masturbating eight to ten times a day. What strange urge sent him out. Was it the books, was it something else? We'll never know. But, the pressure was there constantly. The pressure had to be released constantly; and, he did . . . until this happened. Until finally it resulted, again, in the ultimate form. And, again, there's a culmination of things here. We have the desire to relieve sexual pressure, we have the excitement to violence, the excitement through pain, we have the necrophilia, the tendency to somehow to get sexual enjoyment from something that's dead. All this culminated in that house that night. It all came together, it all came together in a very unfortunate way. Dr. Donnerstein showed . . . or spoke of "snuff films". That night on East Tennessee Tom Schiro finally became the "snuff film" king. It all came together and he was, although not probably consciously in his mind, it was all leading to that point, and finally there was a "snuff film" made by him. That is the definition of insanity; those are the considerations. And, remember, it's (inaudible) the substantial capacity to do these things, not whether or not on isolated occasion perhaps he did. Did he have a substantial capacity to do it, or was that substantial capacity destroyed, affected by a mental disease or a mental defect. It's your decision. You've heard expert testimony only to aid you. Take what you think is valuable and reject the rest. In your own mind, take that test, look at the facts and determine. I

believe the evidence shows that he did not have, he did have a mental disease, a defect, and he did not either appreciate the wrongfulness of what he was doing, or he did not, he could not conform his conduct. But, again, I'm at an angle, you're in the middle, and I'm not going to attempt to tell you what to do. After you decide that issue, you have two choices: yes, he is not responsible by reason of insanity; no, we disagree, the scale did not tip, it's not more likely true than not. And, then in your determination, he's sane. Once you reach that point then you must consider the guilty, but mentally ill verdicts. And, as to each crime charged, you are also authorized to find that he was guilty but mentally ill at the time, as to one of those crimes. And, again, the Judge will read this to you, but I'll do it because there's going to be a lot of instructions, very frankly, and perhaps you're going to have a hard time understanding them all as they come to you. On the guilty but mentally ill verdict, mentally ill, you'll be instructed, as this term is used in such a verdict, means having a psychiatric disorder, which substantially impairs the person's thinking, his feeling, his behavior, and impairs the person's ability to function. The burden, the Judge will instruct you, is on the State of Indiana to prove that that is not the case. They have the burden to show that he was not mentally ill. If you believe that he was, or you have a reasonable doubt as to whether or not he was, then your verdict, in the event you do not find he was insane, your verdict shall be guilty, but mentally ill, of a crime. I'm not going to talk on that much at all. You've heard all the evidence, and folks, if Tom Schiro is not mentally ill, as I've just read the definition to you, then may God help us all. If this twenty year old high school dropout does not have something wrong with him, is not mentally ill, then we are all in a lot of trouble. I don't think there's any disagreement on that. I don't think I've heard any expert witnesses from whatever background, whatever materials, or whatever they looked at or who they were, I don't think I heard any of them

say that he wasn't mentally ill, or sick. He has a lot of problems. And, that's all I'm going to say about that, and that doesn't come unless any, to my way of thinking, that wouldn't come until you've decided insanity issue. The next step would be, then, to determine guilty of what. There are three crimes charged. There is murder, and the Judge will tell you, read you the statutes on these. There's murder, there's murder while attempting, or . . . attempting or committing rape, and murder while attempting to or committing criminal deviant conduct. There are also what are known as lesser included offenses. You have the three charges, and then included within those charges are other crimes, which he, perhaps could be found guilty of. The Judge will read those to you, too. They will be voluntary manslaughter and involuntary manslaughter. Listen to those definitions, because this is what you're going to be dealing with. He will also instruct you that if, while deliberating, you have a reasonable doubt as to which of two degrees he is guilty of, you should return a verdict of the lesser degree only. In other words, if you're back there deliberating and you say, well, he may be guilty of murder and he may be guilty of voluntary manslaughter, and I have a reasonable doubt. It would be the lesser degree only, the voluntary manslaughter only. The Judge will tell you all this, and probably those who have sat on a jury before may have already heard it. Was there a killing? Sure, no doubt about it. Did Tom Schiro do it? Sure, all this stuff about finger prints and pictures on the floor, and all that was just to keep Mr. Atkinson on his toes, you can't let the man relax. There's no question about it, I'm not going to try to . . . in the words of one country lawyer in Evansville, I'm not going to try and "bamboozle" this jury. There was a killing and he did it. If you come to the point of deciding what he was guilty of, if you get past consent, and you take care of the question of mentally ill, I think there's two things you should think about. I'm just going to let you come out and let you think about them, and let you do with

them what you may. The deviant conduct which, by the charge, was the insertion of an object into the sex organ of the victim, of the decedent, I believe the evidence shows, came after death. What you must then ask, is whether or not at the time he killed her he was attempting to or committing, or actually committing that deviant conduct. Is there a connection between the two? I think the evidence is very susceptible to the construction that it was an afterthought. I don't know, but that's something to think about. As to the rape, it was a rape while committing or attempting to commit . . . or was a murder while attempting to or committing rape? I'm pretty sure I would offend some of you if I said there was consent. I don't know, but there are a lot of strange circumstances. There really are. The evidence showed a lot of strange things. The State would have you to believe that she was struck on the head, layed down on the bed, got up, got dressed, after sustaining a fairly severe head wound, at which point she would have known, somebody means business. After sustaining such a head wound, got dressed, and ran out the bedroom door? Maybe it happened that way, but you people, when you became jurors, did not leave your common sense at home, I hope. Is it common sense to think that someone who has just been brutally assaulted and who has lost a considerable amount of blood on the bed, and obviously at that time is aware of something very serious that's going to be done to her perhaps, would get up, get dressed, or would that person, regardless of the cold, regardless of whether or not he was still out there, head out that door, head down to old 41, a half a block away, new 41, somewhere, and get help. What would be the first thing that would go through your mind? I have to get dressed, or I have to get out of here? Again, I don't know, that's something you people have to deal with. Another thing they talked about is, showing some sort of (inaudible) was this letter, Darlene, don't come in, please, I've called the police. Again, common sense. If you were seriously wounded, someone is going to

do you harm, you'd get dressed and write a note? And, even if you do, even if you are concerned about alerting your roommate, what do you say? Do you say, help? Do you say, don't come in, there's a lunatic in my house? Don't come, there's a madman? Don't come in, there's a killer? No, according to the State, you say, don't come in, please, I've called the police. This note, I think is acceptable to the other interpretation, that that is a left over note from a love squabble. I think there's another letter there concerning some disagreements that she had had with Darlene. I think that's just as reasonable an interpretation of that note as what the State wants. There's all these other bizarre things, and I can't sort them out. I cannot sort them out personally, but you people will have to. There's the question of the beer. Why beer in the can? Lite beer in the trash? It came from somewhere. Tom has an explanation. There's a question of the wine bottle. Somebody drank it. Laura had quite a bit of liquor. How did all that happen? Something to think about. If I would make a statement to you, if I said that you were going to hear evidence of a very sick young man, and that I hope that by the end of this trial you have some pictures so far as that is humanly possible sitting here in this artificial atmosphere, some pictures of why and how he got this way. Why and how we are here today, why Tom Schiro is sitting there. And, I hope you do, I really do. I hope you can take everything you've heard and use the best, and form some opinions. Take your time, talk it over, and render what you think is a proper verdict. Don't do what I want you to do, or what Mr. Atkinson wants you to do, and don't do what you think other people may want you to do. Bring the verdict with which you feel comfortable. Bring in a verdict which you feel the evidence supports. I would like to thank you for sitting through this and putting up with some of our antics. I'd like to thank you for listening to me.

MR. ATKINSON: I, too, ladies and gentlemen of the jury,

would like to thank you for your patience. Uh, only a couple of very, very brief observations in passing. I have given some thought to whether or not to expose you to one more exhibit, and I've decided that, uh, you just don't have to see it, alright? There's no reason for it. You've seen enough. There are some things I want to point out. Mr. Keating makes an interesting argument that it isn't criminal deviant conduct to do it to somebody after you've killed them. Uh, be that as it may, be that as it may, you are only going to be allowed to return one verdict. I didn't tell you about lesser included offenses, because, quite frankly, the State doesn't believe that this is a lesser included offense. I didn't tell you about the difficulties of making those fine line distinctions because I think this is what you call a gross . . . grossly obvious case. I think guilt has been clearly established . . . I'm sorry, I do not think guilt has been clearly established, I can't share with you my opinions. I think that you will easily find that guilt has been clearly established here. The real question is whether or not Thomas Schiro is legally insane, whether or not he should be relieved from his responsibilities, alright? And, I listened, I listened for an idea from Mr. Keating, and I didn't hear it. The idea is that mere moral or mental depravity is not insanity. It's a holding of the State of Indiana, uh, a holding of the Courts of the State of Indiana, Supreme Court of Indiana, in Goodwin versus State, at 96 Indiana, 550. Think about that. Moral depravity, mere moral or mental depravity is not insanity. That's an old case. That's like eighteen hundred and something. I don't have the right number down there, I don't have any number at all, but it's a very old case. I listened for that idea when Mr. Keating read to you the definition of mental disease or defect. I listened very carefully. I'm sure you did too, and I'm going to read it to you again, just like he did, only I'm not going to stop just where he did. Mental disease or defect is found in Indiana Code 35-41-3-6(a). A person is not responsible for having engaged in prohibited conduct if as a result of mental disease

or defect he lacks substantial capacity, either to appreciate the wrongfulness of the conduct, or . . . that's Mr. Keating's "or", mine too, or to conform his conduct to the requirements of law. Then comes (b). (b) says, mental disease or defect does not include an abnormality manifested only by repeated unlawful or antisocial conduct. That means if this jury finds in dealing with the question of insanity that Thomas Schiro is abnormal, as indeed you may well find, and that his abnormality is found in repeated unlawful or antisocial conduct, that that doesn't qualify for the legal definition of insanity. It's the same idea, mere moral or mental depravity is not a defense. Mere moral depravity, mere antisocial conduct, an abnormality that's found only in repeated unlawful or antisocial conduct is not insanity. It's no defense to this crime. Let Mr. Keating have his argument. You're only allowed to return one verdict. You can't find him guilty of criminal deviant murder. You can . . . and rape, murder, and murder. Let Mr. Keating have his argument. We obviously have proven . . . . I'm sorry, I can't do that. You may find that we have obviously proven that there was a rape. You may find that we have obviously proven at this trial that there was a murder and the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict. I want to make one last shot at Mr. Keating. I can't help it. It has to happen. Common sense, it's called. I have an angle on that too. The angle I have is, if you wake up and you're lying there in a pool of your own blood, and you've been assaulted, and you've been unconscious, and the world kind of swims back into focus, and it's the fourth day of February and colder than all "get out" outside, that you don't run naked, screaming into the night, if in the other room, there is passed out, unconscious on the couch in the living room, away from the clothes and away from the writing materials, a person who isn't in control of the situation anymore because he's sleeping or passed out. You put on some shoes to keep from getting

frost bite, you put on somebody's coat, you don't care who, so you don't freeze, and because you love the person that's about to come back to the same house, oh, my God, you write a note. What do you say? I've been raped, but please don't scream, he might wake up? How do you communicate the idea that there is a murderer, maybe, a rapist, certainly, a violent person just inside that door? Or, do you leave your loved one up to the tender mercies of the likes of Mr. Schiro? Common sense, and now comes my angle. You see, the evidence, if you reflect on it, will show that the door that was ajar was the bedroom door. The evidence will reflect . . . it will show, if you reflect on it, that the corner with all of that blood on it, was the corner next to the bedroom door. The evidence, if you reflect upon it Mr. Keating, will show you undoubtedly that the couch is in the living room. That's the angle I have on it. He was passed out and temporarily not a threat and if she'd have been two steps quicker, she'd be alive today, but you know what? She didn't make it, and maybe her tender love and concern for Darlene Hooper in writing that note, cost her her life at the hands of that man who is now trying to avoid responsibility for his conduct the same way he has always tried to do it, by saying, oh, look at me, I'm sick. I need help. I'll be better, I'll be a better little boy. Well, this little boy is a killer.

APPENDIX B

TRANSCRIPT OF FINAL ARGUMENTS AND INSTRUCTIONS AT THE SENTENCING PHASE

THE COURT: . . . Now, Mr. Atkinson, do you wish to proceed with your summation?

MR. ATKINSON: I would make a very few comments again to the jury. Uh, I think I've told you now on two occasions, it's my style to let the evidence do the talking, that it's not my intention to persuade you to a point of view, but it's rather to allow you to find truth and justice as it exists. The Court will read to you something that I want to emphasize, uh, it's not necessary for us to put on any additional evidence during this stage of the proceeding. You've heard the evidence sufficient in my view to allow you to consider the imposition of the death penaltv. The Court will read to you from the case of Brewer versus State, found at 417 N.E.2d, 889, a decision by the Supreme Court of the State of Indiana, on March 6, 1981, and will tell you that we don't have a provision for a life sentence in the State of Indiana anymore, and that the range of sentences for murder, if the death penalty is not imposed in this case, as it was in that case, is a fixed sentence of from thirty to sixty years, that being fixed by the Court, not by you, and that one sentenced, including Mr. Schiro in this particular case, could earn credit for good behavior to apply against the sentence, whatever it might be, with a maximum allowable credit of fifty percent of the sentence. That means if the death penalty is not imposed in this case, the range is from thirty to sixty years and the possibility of, of release pursuant to the automatic good time provisions is from fifteen years from the date of sentencing, to thirty years, Some offenses, I believe, and maybe you do too, are so heinous that the perpetrator of the crime, the person who

does those acts, forfeits his right to sus . . . expect our society to support him for an appreciable portion of the remainder of his life. Surely these offenses are within that category.

MR. KEATING,: May it please the Court, Mr. Atkinson, ladies and gentlemen of the jury. I likewise will not talk very long to you. Clarence Darrow, who is, some of you may have heard of, a very well known trial attorney, somethimes [sic.] spent up to a day giving final arguments to the jury. I'm not going to do that to you, and I imagine every one of you over the last two days, since you've been home, have been thinking about this, thinking about what's coming up, and maybe in your own mind have even decided what you might do. I ask that you put aside what you've been thinking about for a few minutes, and put it aside until you've discussed it with other members of the jury. The considerations that you have will be three, and the Judge will provide forms of verdict for you for recommendation of the death penalty, recommendation of no death penalty, and for no recommendation. And those are the three considerations that you will have when you go back to the jury room. The alternative to that, as Mr. Atkinson has explained, the alternative to the death penalty in this case, is a prison sentence from thirty to sixty years, at Judge Rosen's discretion, and that if maximum good time is allowed, maximum good time, it could be, actual time done could be cut in half. I want to make one comment to you. That's a load of years. Tom Schiro, I think the evidence shows, is twenty. I think we all can add. That's the alternative to what you have to decide today. The statute again, I'm not going to read the whole thing to you, because the Judge will send it back with you, provides for aggravating circumstances. There is one listed in this case, and one which you may consider. And that one is that the murder was committed, was intentionally committed in the commission of rape and some other things. I assume by your verdict Friday, or

Saturday, that you've probably reached that point; you've probably decided that issue. In finding him guilty of murder in the commission of rape, I'm assuming you've decided beyond a reasonable doubt that it was done in the commission of a rape, and so that aggravating circumstance most likely exists in your mind. But that's the one you may consider. On the other hand, you have to then consider whether or not that fact, that one aggravating circumstance outweighs any mitigating circumstance that may exist, and I'm not going to sit here and go through all possible mitigating circumstances, because I'm sure to miss some. I'm sure you can think of a lot of others. But, I want to talk about just a few, for your consideration, and I'm not limiting what may exist. I want to just limit my time to a few. Number two says that if Defendant was under the influence of extreme mental or emotional disturbance when he committed the murder. Dr. Woods, the Court appointed psychiatrist, when asked, is he mentally ill, replied, Oh yes, without hesitation. The State's own witness, Dr. Crane, I remember, stated that he was a very, extremely disturbed young man. And then we had the evidence from Mary Lee, his girl friend, the evidence from Dr. Osanka. I'm not going to review all that with you. I think all of that shows he was under a very extreme emotional and mental disturbance at the time. I think that mitigating circumstance exists. I think that's something you should consider in determining whether the death penalty is appropriate. Another one is that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired as a result of mental disease, mental defect, or intoxication. Now, I imagine all of you recognize that. That's the insanity definition kind of turned on end with one important factor added. They throw in intoxication. Why is that important? Well, I think the evidence, and you remember it just as well as I do, the evidence showed that every time Tom Schiro went out and did something, did something wrong, he

was drunk, he was high, and to maybe paraphrase Dr. Osanka, his problems, his problems with sex, his problems with drugs, his problems with alcohol, individually, were great, but you put them all together and you have a catastrophe. And I think that's what you can consider here. Throw intoxication into the scheme, on the insanity defense, we're talking about mental disease or defects. Throw in Tom Schiro's mental state, throw into that mental state, alcohol. Throw into that mental state, drugs, and what do you have? I think what you have is a lessened ability to appreciate what you're doing or to control yourself. And in this case, you can consider that as a mitigating circumstance. The last one I want to talk to you about, perhaps at some length, is number seven, and the Judge has read other ones to you which you may consider, but number seven says, any other circumstances appropriate for your consideration. Well, what could those be? Let me suggest just a few things. A lot has been brought out during the trial of this case about how Tom Schiro is avoiding responsibility for what he has done, how he is trying to get out of this, doesn't want to accept responsibility. Well, think about it for a moment. If he had not confessed, if he had kept his mouth shut, if he had not told Ken Hood, if he had not told Mary Lee, ladies and gentlemen, we would not be here. Think back on the evidence. What is there, what was there in that house that linked that murder to Tom Schiro? There was nothing. What was in that car that linked that car to Tom Schiro? One thing only, it was in the general neighborhood of where he was. On the fingerprints, there was nothing discovered that would link it to him. He was not a suspect, Ken Hood told you, at the day he confessed. They had not narrowed it down to him, and I submit to you, they could not have narrowed it down to him. Take away those confessions and you do not have a case. So, what did Tom Schiro do? He turned himself in, in effect. In his own strange way, he turned himself in. He told Mary and he told Ken Hood. As a plea for help, perhaps. As

a plea that, yes, I will accept whatever comes. I hope it is help. I hope somebody can help me. That I am willing to accept whatever happens. He came and said, I did it. Again, in his own strange way, that he did it that way. So, I think you can consider that in deciding whether or not it is appropriate in this case. He has not tried to escape his responsibility. In fact it was his owning up to it and saying he did it that brought him here today before you to determine his fate. And we talked a lot about the, the bad Tom that, I think there was some evidence at trial that maybe there was a good Tom too. Mary Lee was talking about the good Tom, the man who was kind, was affectionate, was loving and was caring, and perhaps it's my fault, perhaps we didn't dwell on that enough. Perhaps all we've done is set here and tried to make the bad Tom known to you and never have taken any attempts to make the good Tom brought out. But, I think there is evidence of a good Tom. There is something in him somewhere, and this something in him somewhere ate at him until he could not take it anymore and he had to tell someonw. [sic.] He could not hold this within him. He was not capable of going through his life knowing what he had done, so he stepped forward again, in his own strange way, and said, I did it. Help me. I did it. Do what you may. Another thing I think you can consider is that, while you may blame him, and while he perhaps should be blamed, what happened on February the fifth, a lot of things that led up to the way he was on February the fifth, it would be very cruel indeed to blame him for. What are your memories of six and seven? Are they going to school? Are they maybe a good friend you had in first or second grade? His memories are of watching pornography film. I think there's a direct link between that and what happened. What are your memories of twelve and thirteen? Going down and playing football on the corner lot with your friends? What are his memories? Or what did he do at twelve and thirteen? He was mapping out a route to peep. And, again, how can you, how much blame

can we give to a twelve year old boy? How much blame can we give a six year old boy? As a twenty year old, as a nineteen year old, twenty year old, yes, we can say, Tom, what you did is wrong. But, folks, I think a lot of evidence shows that what he was on that date started a long time ago, and it would be very hard and very, I think, hard hearted indeed to say that we can blame you also for what happened back then when you were young. He's before us today, not only because of what he did on February fifth, at age twenty, but because what he did at six and seven and eight and nine and ten and eleven and twelve and thirteen and fourteen. So I think that's something you can consider. And there's one other, I think appropriate consideration and one more only that I'll talk about. A gentleman by the name of Arthur Koestler, a writer, whom some of you may have heard of, wrote, his most famous book, I think is "Darkness at Noon", but Arthur Koestler himself, was one time under, under penalty of death. Death sentence was suspended and he later escaped that, and in England wrote a series of articles on the English death penalty, which, at that time, was death by hanging. And in speaking of the death penalty and the people who favor it and the people who oppose it, he had this to say, "The division", that is the division between those who favor it and those who oppose, "is not between the rich and the poor, hi-brow and low-brow, Christians and atheists. It is between those who have charity and those who have not. In this age of mass production, charity has come to mean dropping six pence into a box and having a paper flower pinned on one's lapel. But originally it had a different and revolutionary meaning. Though I speak with the tongue of men and angels and have not charity, I am become the sounding brass, or a tinkling cymbal, and though I have all faith, so that I could remove mountains, and have not charity, I am nothing. And though I bestow all my goods to feed the poor, and have not charity, it profit me nothing. Charity, in this ancient meaning of the word, is about the most difficult virtue to acquire,

much more difficult than equity, kindness, or even self sacrifice. The test of one's humanity is whether one is able to accept this fact, not as lip service, but with the shuddering recognition of a kinship. Here, but for the grace of God, drop I." Tom Schiro was not dropped here, delivered here from a space craft, and you wonder why am I talking about that. Tom Schiro started off this life the same way that every one of us did. He had a mother and a father, and he began growing and learning just as we did. Somewhere along the line, somewhere he took a terrible, terrible turn. But here, but for the grace of God, go I, and go us. Here, but for the fact that I had loving parents, or you had loving parents. Here, but for the fact that we had something strong within ourselves that caused us to be able to pull away from temptation when we faced it. Here, but for the fact that we did not have something within us that caused us to seek out erotic satisfaction at every turn. Here, but for the fact that we had older brothers or older sisters who we could model after and see how it was done. Here, but for the grace of God in our growing up, step each one of us. And if you can accept that fact, then I think you have true charity. Now, you say, well, it sounds like you're asking for sympathy for him. What sympathy did he show the victim? Koestler says, "There also exists a kind of pseudo charity, expressed in sayings like, you asked for sympathy for the murderer, but what about the poor victim? The answer is that we sympathize with the victim, but we do not wish to add a second crime to the first. We sympathize with the victim's family, but we do not wish to cause additional suffering to the murderer's family." You have two choices, or three choices here. You can say, yes, Tom, we will not kill you. We will not cause you to be killed, but we will make sure that you will be locked up where you cannot do anything harmful to any members of society for a very long time, and you can say, yes, Mr. and Mrs. Schiro, we will not cause your son to be taken from you, but we will insure that he will not harm anyone for a very, very long time.

If one's looking for an example of caring, I think we saw, one of the most startling examples in this trial, Mary Lee, who's own son was . . . suffered physical and emotional torture and abuse at the hands of Tom Schiro, which she later discovered, was able to say I hate what he has done, but I cannot hate him because he is sick. Someone else said the same thing in a little different form. I think the saying was, hate the sin, but love the sinner. Well, love may be a little bit more than we can ask for today, but charity is not. Charity because Tom Schiro is one of us. Your consideration is whether or not the single aggravating factors [sic.] that exist is outweighed by the mitigating factors I have mentioned and the mitigating factors that you may be able to think of. A recommendation of no death penalty in this case, I think, would be a very noble one, I think, one you can be proud of. Sitting there and saving, no, we will not cause a sick person, we will not cause this person to lose his life, but we will protect society. A very noble, a very noble verdict indeed, I think. I ask you, on his behalf, I ask you that that in fact, be your verdict. Thank you.

MR. ATKINSON: I made some notes . . . as the counselor was talking about charity. The difference between having charity and having none, is reflected here. And he hit the nail right on the head. My immediate response, my note to myself was, give him the same charity that he gave to Laura. I guess that's maybe vindictive. I guess maybe that's biblical. I guess maybe that's an eye for an eye and a tooth for a tooth. And I listened to what Mr. Keating had to say about it being cruel of you, cruel of you, to blame Mr. Schiro for the way he was. Well, somewhere along the line I think we need to be reminded that we are all given an effective choice. In this society more than any society anywhere else on earth, we have effective choice. We can be what we choose to be. We can become, here more than anywhere else what we choose to become. What about Mr. Keating's idea of it being cruel to blame Mr. Schiro? Well, Mr. Schiro

chose to beat. Mr Schiro chose to rape, and Mr. Schiro, as I recall the evidence in this case, chose to kill so he wouldn't be caught. You don't look at the single aggravating circumstance like a little weight placed on one side of the scale. You look at the nature of the aggravating circumstance. You look at how it happened. I submit to you that from the time Mr. Schiro went to the front door, the lady was dead. She had to be because for the first time Mr. Schiro was doing it, what it was that he did, was doing it right across the street from where he worked. There was no other way out from the time he first hit the lady. If he wanted to avoid responsibility, he exercised effective choice and he gave charity . . . well, I don't want to . . . I don't want to belabor what Mr. Keating said. I have a tendency to get a little fired up when I'm responding to argument, and I think you all have heard the evidence and I think that you all probably have given a lot of thought over the last couple of days as to what you're going to be confronted with. The problem here we have is that a sentence for a crime is supposed to fulfill certain purposes. One of the purposes that we have to be fulfilled here is that your sentence should be a deterrent to Mr. Schiro engaging in the same conduct again. The only effective certain deterrent, the only way that you can be sure that sixteen years from now there won't be a repeat performance, is to exercise the ultimate deterrent and make it impossible. Your opinion is just that. You decide and you make a recommendation to the Court. The Court imposes the sentence. If you find that you can't agree among yourselves, the Court will impose some sentence. If you find that the death penalty should be imposed, the Court will impose some sentence, and if you find that the death penalty should not be imposed, the Court will impose some sentence. The ultimate responsibility lies with the Judge. Your opinion is advisory and I guess, I guess that we need to think about the nature of the aggravating circumstance. I do, I do. I think about that. I think of

how this happened. I think of the nature of the attack, the vicious, smashing, biting, nasty, hostile, aggressive, unasked for, unwanted attack; not unlike that of a rabid animal. We all know what we do with rabid animals, and I suspect that that appropriate remedy might be useful here.

THE COURT: I will now proceed with my final instructions. You are instructed that in the event the Defendant, Thomas N. Schiro, is not sentenced to death, he will be sentenced by the Court to a fixed sentence of from thirty years to sixty years, and in that connection I am going to read from the recent case of Brewer against the State, cited in 417 N.E.2d, page 908. There is no longer any provision in our statutes for a life sentence. That the range of sentence for murder if the death penalty was not imposed was a fixed sentence from thirty to sixty years, and that one sentence[d] could earn credit for good behavior to apply against the sentence with a maximum allowable credit of fifty percent of the sentence. The Court further instructs that the sentence could be fixed by the Court and the determination of the jury would not be binding, but would be a recommendation only. And the statement made by counsel that he, with a thirty year sentence for good behavior, there would be a minimum period of fifteen years. With a sixty year sentence, there would be a minimum possible sentence of thirty years. The State is seeking the death penalty in this case by alleging on its Count IIA of its criminal Information, of the existence of aggravating circumstances, and Count II A, Death Sentence, I will read again. The crime of murder as charged in Count II in the information filed herein, was committed by the Defendant, Tom Schiro, Thomas N. Schiro, and the following aggravating circumstances exist which justify the imposition of the death sentence. The murder of Laura Luebbehusen, as charged in Count II, was intentionally committed by the Defendant, Thomas N. Schiro, during the commission of the crime of rape, more particularly described in the Information,

constituting an aggravating circumstance, justifying imposition of the death penalty. The law provides for the death penalty upon conviction for the crime of murder under the following circumstances: the Defendant, one, committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery. You are to consider the following mitigating circumstances: the Defendant has no significant history of prior criminal conduct; two, the Defendant was under the influence of extreme mental or emotional disturbance when he committed the murder; three, the Defendant, the victim was a participant in or consented to the Defendant's conduct. The Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect, or of intoxication. Lastly, any other circumstances appropriate for consideration. You are to consider both aggravating and mitigating circumstances and recommend whether the death penalty should be imposed. You may consider all the evidence introduced at the trial resulting in the Defendant's conviction of murder, together with any new evidence at this hearing. The Court is not bound by your recommendation. If the State fails to prove beyond a reasonable doubt the existence of at least one aggravating circumstance, or if you find that the mitigating circumstances outweigh the aggravating circumstances, you should not recommend the death penalty. If the State did prove beyond a reasonable doubt the existence of one aggravating circumstance and you further find that such aggravating circumstance outweighs any mitigating circumstances, you may recommend that the death penalty be imposed. Now, [the] Court is submitting to you a form of possible recommended verdicts, which you may return in this case. This form will be supplied to you, and I'll give this to the Bailiff when you retire to the jury room for deliberation. The

foreman will preside over your deliberation and must sign and date the recommended verdict, to which you all agree, and which I have provided for all of you to sign. Now, I will read over the three possible verdicts. First, we, the jury recommend the death sentence be imposed upon the Defendant, Thomas N. Schiro. Dated, will be September 15, 1981. Foreperson. And I have eleven other places for signatures. Second, we, the jury recommend that the death penalty not be imposed upon the Defendant, Thomas N. Schiro. Dated, foreperson, and eleven other places for signature. And, lastly, we, the jury, have no recommendation. Dated, foreperson, and eleven other places. The Bailiff has heretofore been sworn to take care and feed and guard you and not to have anything interrupt. I will give you this proposed three verdicts, and I will give you the final charge, instruction as to the death penalty, which I have indicated. You may retire and when you are ready you may knock on the door and inform the Bailiff. The alternate juror may rest here.

(JURY LEAVES THE COURTROOM AT 1:47 P.M. FOR DELIBERATION AND RETURNS THEIR VERDICT AT 2:48 P.M.)

No. 92-7549

In The

Supreme Court of the United States

October Term, 1993

THOMAS N. SCHIRO,

Petitioner,

vs.

ROBERT FARLEY, Superintendent
Indiana State Prison, et al.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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I. TRADITIONAL DOUBLE JEOPARDY PRINCIPLES BAR SCHIRO'S DEATH SENTENCE FOR A CRIME OF WHICH HE WAS ACQUITTED.

A. The Double Jeopardy principles governing prior acquittals and prior convictions are not identical; the doctrine of former acquittal bars the sentencing trial of a defendant on a charge in aggravation after he has been acquitted of the aggravator by the jury at his guilt trial.

Respondent contends that traditional principles of Double Jeopardy have no application to this case, and that petitioner's "claim, properly viewed, is one of collateral estoppel rather than of double jeopardy *simpliciter*." Respondent's Brief at 15. This radical shift of position[1] reflects Respondent's belated recognition of the impossibility of its position under *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970), if Double Jeopardy principles *do* apply to Schiro's claim.[2] Respondent says that they do not because "Double Jeopardy, in the classic sense, prevents retrial regardless of whether the first trial ended in conviction or acquittal," Brief of Respondent at 11, "therefore, petitioner's double jeopardy argument would prevent *any* sentencing of a defendant after the 'guilt phase' of a trial has ended." Brief of Respondent at 11. This argument – that if

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[1] Respondent argued in its Brief in Opposition to certiorari that Schiro's collateral estoppel claim was waived because Schiro had purportedly failed to raise it in the Court of Appeals. This argument, too, was baseless. Schiro plainly contended in the Court of Appeals that his death sentence violated both principles of autrefois acquit and principles of collateral estoppel. See, *e.g.*, Brief of Petitioner [in the Court of Appeals] at 16: "This issue specifically contends that the doctrine of collateral estoppel was violated."

[2] Respondent notes that "[t]he grant of certiorari in *Caspari v. Bohlen*, No. 92-1500 . . . encompasses the question of whether *Bullington v. Missouri*, [351 U.S. 430 (1981),] should be overruled. Brief of Respondent at 25, n. 17. But that question is not presented in the present case, and Respondent is in no position to raise it. Nowhere in the lower courts or in its Brief in Opposition to certiorari did Respondent challenge *Bullington*; it cannot, therefore, do so now. See *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2081 n. 1 (1993).

Double Jeopardy precludes a defendant's being sentenced for a crime of which he has been acquitted, it must equally preclude his being sentenced for a crime of which he has been convicted – is utter nonsense.

To be sure, the Double Jeopardy Clause of the Constitution encompasses the principles both of *autrefois* acquit and *autrefois* convict. But this does not imply, as Respondent does, that the doctrines of former *acquittal* and of former *conviction* are identical. The reason for the recognition that the Double Jeopardy Clause encompasses both is because they are different, not because they are the same. See *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) ("[*Justices of Boston Municipal Court v.] Lydon*[, 466 U.S. 294 (1984)] teaches that '[a]cquittals, unlike convictions terminate the initial jeopardy.' (citation omitted)").

"An acquittal is accorded special weight." *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980); see also *United States v. Scott*, 437 U.S. 82, 91 (1978) (the "law attaches particular significance to an acquittal."). Thus, the Double Jeopardy Clause bars a second trial following acquittal even if "the acquittal was based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). It does not, however, bar a second trial following an erroneous *conviction* and the reversal of that conviction. *United States v. Ball*, 163 U.S. 662 (1896). Had Ball been acquitted instead of convicted, he obviously could not constitutionally have been retried.

Respondent's argument seems to be that jeopardy does not end until sentencing proceedings have concluded. That is not – and of course cannot be – the rule in cases of acquittal. "[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Ball, supra*, at 671. The rule which Respondent propounds completely ignores the Court's repeated holdings that acquittals enjoy a special position in double jeopardy law. See generally *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or

otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' ").

As the Court noted in *Smalis v. Pennsylvania*, 476 U.S. 140, 145-146 (1986) "the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged,' *Martin Linen*, [*supra* at 570]." Clearly, if Double Jeopardy bars an appeal because it would result in further fact findings, then it must likewise bar the situation here where the case proceeded directly to the "further [fact-finding] proceedings" with no intervening appeal.

A second proceeding is barred following a conviction only if all elements of the offense to be tried are the same as those involved in the original proceeding. Since the matters at sentencing in a noncapital context are different than those which the state must prove in the guilt proceeding, there is no Double Jeopardy bar to proceeding with sentencing following a conviction. Thus, Respondent's contention that Schiro's argument would result in the state's inability to proceed to sentencing after a conviction is specious.[3]

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[3] The cases cited by Respondent, *North Carolina v. Pearce* and *United States v. DiFrancesco*, are irrelevant to the issue before the Court because both cases dealt with sentencing hearings following conviction. In *DiFrancesco* the Court explained the differences between double jeopardy concerns related to sentencing and those regarding guilt-innocence determinations: "The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the bases of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature."

B. The implied acquittal doctrine applies to charges which are not greater and lesser offenses, and here the jury's failure to return a verdict of knowing murder is the constitutional equivalent of an acquittal.

Respondent argues that the *Green/Price* doctrine of implicit acquittals does not apply to Schiro's case for two reasons: (1) both *Price* and *Green* involved reprosecution for a greater offense after the defendant had been convicted of a lesser offense; and (2) in *Price* and *Green* each defendant was subjected to a complete reprosecution for the greater offense following appellate reversal of his conviction for the lesser included offense. Brief of Respondent at 19-20.

Respondent's contention that the holdings of *Green* and *Price* cannot be "extended" to the situation here because Schiro's case does not involve greater and lesser included offenses is answered by the *Green* opinion itself. In *Green* the Government contended, as Respondent does here, that the implicit acquittal doctrine should not apply because the offenses were not greater and lesser included offenses in that each contained elements not present in the other. The Court, noting that it "failed to comprehend how this assertion aids the Government," stated:

> In the first place, the District of Columbia Court of Appeals has expressly held that second degree murder is a lesser offense which can be proved under a charge of felony murder. [citations omitted]. Even more important, Green's plea of former jeopardy does not rest on his conviction for second degree murder but instead on the first jury's refusal to find him guilty of felony murder.
>
> *It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense. If anything, the fact that it cannot be classified as "a lesser included offense" under the charge of felony murder buttresses our conclusion that Green was unconstitutionally twice placed in jeopardy.* American courts have held with uniformity that where a defendant is charged with

> two offenses, neither of which is a lesser offense included within the other, and has been found guilty on one but not on the second he cannot be tried again on the second even though he secures reversal of the conviction and even though the two offenses are related offenses charged in the same indictment. [citation omitted].

355 U.S. at 194, n. 14 (emphasis added).[4]

Respondent's effort to bring the present case within *Cichos v. Indiana*, 385 U.S. 76 (1976), by citing *Schad v. Arizona*, 111 S.Ct. 2491 (1991) (plurality opinion) for the proposition that "felony murder and knowing murder are . . . two ways of proving the same offense," Respondent's Brief at 20, is unavailing. The statute at issue in *Schad* permitted the jury to find the defendant guilty of first degree murder if the state proved either that the killing was premeditated or that it was committed during the commission or attempted commission of a robbery. Schad was indicted on a single count of first degree murder, and his jury was instructed that it could return a guilty verdict if all jurors unanimously agreed that either of the state's first degree murder theories had been proven beyond a reasonable doubt. In Schiro's case, unlike *Schad*, the state chose to file three separate counts of murder,[5] alleging both *mens rea* murder and felony murder [J.A. 3-5]. In Schiro's case, unlike *Schad*, separate verdict forms were given to the jury for each offense charged [J.A. 37-38]. By returning a guilty verdict on the felony murder – rape form and failing to return such a verdict on the *mens rea* murder form, the jury acquitted Schiro of the latter charge.

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[4] Likewise, in Indiana, "the cases generally make no distinction as to whether the numerous counts are lesser included offenses, greater offenses, or merely different charges concerning the same transaction. . . . [T]he axiom, silence means acquittal, [is] applied with no regard as to whether the count on which the verdict was silent was a greater or lesser included offense or a different charge for the same unlawful transaction." *Cichos v. State*, 208 N.E.2d 685, 687 (Ind. 1965).

[5] In Indiana, as elsewhere, the charging decision is the exclusive domain of the state. *Adams v. State*, 262 Ind. 220, 314 N.E.2d 53 (1974); *Van Hauger v. State*, 252 Ind. 619, 251 N.E.2d 116 (1969).

Finally, Respondent's suggestion that *Green* and *Price* are distinguishable from Schiro's case because *Green* and *Price* involved a complete reprosecution is untenable. Double Jeopardy following acquittal bars not only a second trial but also further factfinding proceedings " 'devoted to resolution of the factual issues going to the elements of the offense charged.' " *United States v. Martin Linen, supra* at 570. There can be no doubt that Schiro's penalty trial was a factfinding proceeding. One of the facts the jury had to determine was whether the state had proven beyond a reasonable doubt the existence of each element of at least one aggravating circumstance. Both alleged aggravating circumstances required the state to prove the elements of *mens rea* murder: an intentional killing. At a minimum Schiro's penalty trial was a further factfinding devoted to a resolution of the factual issue of intentional killing that had already been tried at the guilt trial.

Thus, *Green* and *Price* clearly dictate the result Schiro seeks. Respondent's attempts to distinguish those cases are baseless.

II. THE STATE COURT DID NOT MAKE ANY FACTUAL FINDINGS RELATED TO THE SILENT VERDICTS, AND THE FACTS OF SCHIRO'S CASE REVEAL THAT THE JURY INTENDED TO ACQUIT SCHIRO OF *MENS REA* MURDER AND FELONY MURDER – CRIMINAL DEVIATE CONDUCT.

A. Section 2254(d)'s presumption of correctness regarding factual findings is inapplicable because there were no factual findings on the issue at bar.

The § 2254(d) presumption of correctness applies only to state court findings of fact. Legal conclusions and mixed questions of fact and law require *de novo* federal adjudication. *Miller v. Fenton*, 474 U.S. 104 (1985); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). Section 2254(d) presupposes that a factual finding was made. Because no such finding was made in Schiro's case, § 2254(d) is inapplicable.

Respondent asserts that the Indiana Supreme Court made a factual determination that the silent verdicts on Counts I and

III did not constitute acquittals and that this finding should be presumed correct. Brief of Respondent at 38. However, the state court made *no* findings of fact with regard to the silent verdicts. Its view of the case rendered any such findings irrelevant.

The state court viewed the issue as whether the prosecution could proceed to the penalty trial and attempt to prove intent to kill after a conviction for felony murder which did not include an intent to kill.

> Schiro claims the aggravating circumstances of intentional killing could not be considered at the penalty phase because the ***felony murder as charged*** lacked the requisite elements of *mens rea* in committing the underlying rape. He attempts to apply a fundamental double jeopardy rule that a ***conviction*** of lesser included offense is an acquittal of the greater offense.

[J.A. 139 (emphasis added)]. The state court concluded that there is no Double Jeopardy violation when the state is permitted to prove additional elements in the penalty trial to support the aggravating circumstance alleged. The basis for this holding was two-fold: (1) under state law, the *crimes* of felony murder and intentional (*mens rea*) murder are not lesser and greater offenses, and (2) an aggravating circumstance is not an offense.

> An aggravating circumstance, however, is not an offense. A person convicted of either type of murder, that is, intentional killing under IC 35-42-1-1(1), or felony murder IC 35-42-1-1(2), can be shown to contain the aggravator of intentional killing justifying the imposition of the death penalty. One can be found guilty of felony murder where the intention was to commit the underlying felony without necessarily intending to commit the murder. It does not follow, however, that one convicted of felony murder cannot be shown to have intentionally killed the victim while perpetrating the felony.

[J.A. 139]

Thus, the state court saw the issue before it as requiring a comparison of the felony murder ***conviction*** and the aggravator alleged in order to determine whether, after a conviction for felony murder, the prosecution could prove at the penalty trial that the killing was intentional.[6] As a result of this misconception,[7] the state court was not required to make any finding with respect to the silent verdicts.[8]

Moreover, the Indiana Supreme Court's language makes it quite clear that the court's decision was based upon the *legal* effects to be attributed to the jury's verdict, not upon any question of *fact*. The court determined that a conviction for felony murder did not "*operate as*" an acquittal of the *mens rea* required for the aggravating circumstance [J.A. 140 (emphasis added)]. It reasoned that: "Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict *could not be considered* to have included any conclusion on that issue." [J.A. 140 (emphasis added)].

Respondent's § 2254(d) argument therefore falls with its premise. The Indiana Supreme Court simply made no factual

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[6] This explains why the majority state court opinion did not address the long-standing state rule that silent verdicts constitute acquittals regardless of whether greater and lesser offenses are involved. See Brief of Petitioner at 23, n. 19 and discussion of *Cichos v. State, supra* at n. 4.

[7] The state court misconceived the issue although Schiro presented it properly. Schiro's argument was:

> It is the position of the petitioner that because the jury failed to find him guilty [of Counts I and III], he was acquitted of those charges. The jury had the opportunity to convict the accused of the intentional murder of the victim, but it chose not to do so. The only intent required to be proven in a prosecution for felony murder is the intent to commit the underlying felony. (citation omitted) Because your petitioner was not convicted of an *intentional* killing, but rather Felony Murder, where the only intent proved is that of the underlying felony, *i.e.*, rape, the State was barred and the court was precluded from proceeding to the second stage of the proceedings.

Brief of Petitioner to the Indiana Supreme Court (2nd PCR) at 54.

[8] The court's recognition that the *crimes* of intentional (*mens rea*) murder and felony murder are not lesser and greater offenses is not a rejection of the fact that the aggravator alleged (intentional murder during the course of a felony) includes all elements of the crime of *mens rea* murder.

finding to which § 2254(d) could attach. No factual matters other than the jury's silence on Counts I and III – a fact not in dispute – were discussed or decided by the state court.

Respondent's suggestion that the lower federal courts relied upon some nonexistent state "fact finding" is equally unfounded. The courts below did not conclude that the state court had made any factual determinations relevant to Schiro's claims, but rather concluded that the state court's *legal* determination was controlling. There was no discussion of § 2254(d) in either federal court opinion, nor in the briefs of the parties. And the texts of the opinions clearly demonstrate that each federal court held itself bound by the state court's *legal* conclusion.

The court of appeals held:

> In order to assess the effect of the jury's findings, this Court looks to state *law*. (citation omitted). The Indiana Supreme Court squarely rejected Schiro's argument that he was acquitted of intentional murder. (citation omitted) . . . Since the jury's verdict did not amount to an acquittal under state *law*, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen.

[J.A. 196] (emphasis added).

The district court held:

> It is a constitutional condition precedent to an application of the double jeopardy clause . . . that there be an acquittal. Whether there is an acquittal depends largely on state *law*. (citation omitted). There is simply no constitutional merit to the argument that somehow the failure of the jurors to render any decision on Counts I and III someway or other constitutes an acquittal which extrapolates into a double jeopardy argument that frees this defendant petitioner.

[J.A. 171] (emphasis added).

Moreover, Respondent has consistently argued that the state court holding rested upon principles of state *law*. Until

now, Respondent has never claimed that the state court made anything but a legal ruling.[9]

B. The jury intended to acquit Schiro of *mens rea* murder and felony murder – criminal deviate conduct.

The record is clear that Schiro's trial judge did *not* tell the jury to return only one verdict.[10] Thus, Respondent is relegated to arguing that Schiro's jury did not intend to acquit him of *mens rea* murder because: (1) in accordance with an alleged long-standing state practice of instructing juries to return only one verdict upon charges of both felony murder and *mens rea* murder, the prosecutor and defense counsel told the jury to return only one verdict; and (2) the issue of intent to kill was not before the jury because Schiro's counsel allegedly did not argue it. Brief of Respondent at 29-34.

1. The attorneys' "one verdict" remarks in summation do not bear the meaning attributed to them by Respondent.

Neither in the state courts nor in the federal courts below did Respondent once suggest that the lawyers' summations at Schiro's trial contained anything pertinent to a proper interpretation of the jury's silent verdicts. Now Respondent professes to find them crucially illuminating. It has set out the

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[9] Respondent argued to the court of appeals that the state court made a *legal* determination that the silent verdicts were not acquittals and that that finding was binding upon the federal courts: "The Supreme Court of Indiana concluded, as a matter of state *law*, that the failure to fill in the verdict forms as to either Count I or Count III was not equivalent to a finding of not guilty on either of those counts . . . And the question of whether or not there is an acquittal is purely a matter of state *law*." Brief of Respondent to the Court of Appeals at 20-21 (emphasis added).

[10] Respondent does not contend to the contrary. Respondent does say that the trial judge "instructed the jury, at petitioner's request, that 'the defendant is not on trial for any *offense* other than *that* charged in the information,' and referred again to the singular, to 'the crime charged.' " Brief of Respondent at 30 (Respondent's emphasis). But the notion that the jurors would have parsed this phraseology as "singular" rather than generic is too strained to require rebuttal.

guilt trial summations in twenty-nine printed pages in Appendix A to its brief in this Court. From these twenty-nine pages, Respondent culls five or six lines and stakes its case on its belated interpretation of them.

We shall show in a moment that Respondent has taken these five or six lines out of context and interpreted them in a way that Schiro's jurors would not have recognized. First, however, we must address Respondent's contention that "[t]he prosecution and defense arguments were entirely consistent with longstanding Indiana trial practice of instructing the jury to return only one verdict where multiple theories of the same offense are charged, as recognized by this Court in *Cichos v. Indiana*, 385 U.S. 76, 79-80 (1966)." Brief of Respondent at 30. Respondent relies upon this "longstanding . . . practice" both to paint the lawyers' summations in the colors that it wants them to wear and also to assimilate Schiro's case doctrinally with *Cichos*. It is therefore doubly disturbing that the supposed practice is a fiction.

a. Indiana juries are not told to return a single verdict when the state charges *mens rea* murder and felony murder for the death of a single person.

There is absolutely no support for the proposition that juries in Indiana are instructed to return a single verdict when the state charges several counts of murder of the same victim.[11] The fact that innumerable Indiana defendants have been convicted of both *mens rea* murder and felony murder for

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[11] Respondent cites two cases as support for its position that *mens rea* murder and felony murder may be tried together but that a defendant may not be convicted of both for the killing of a single person. Brief of Respondent at 30, citing *Sandlin v. State*, 461 N.E.2d 1116 (Ind. 1984) and *Bean v. State*, 267 Ind. 528, 371 N.E.2d 713 (1978). These cases hold only that under state law the trial judge may not enter a *judgment of conviction* and *sentence* for both *mens rea* murder and felony murder for the death of a single person. However, it is permissible for the jury to return *verdicts* on both charges. *Carter v. State*, 361 N.E.2d 145, 149 (Ind. 1977). If the defendant is convicted of both, it is the sentencing court's duty to merge the offenses and to enter judgment of conviction and sentence for only one of them. *Id.*

causing a single death belies Respondent's assertion that the state practice is what Respondent says it is.[12]

The practice involved in *Cichos* was another matter entirely.[13] Cichos was charged with involuntary manslaughter

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[12] If the practice in Indiana were as Respondent represents it to be, one would not expect to find reported cases where the defendant was convicted of both offenses. See *Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991) (it is a "sound presumption of appellate practice" that "jurors are reasonable and generally follow the instructions they are given"). But the following are a sampling of cases in which the defendant was found guilty by a jury of both *mens rea* murder and felony murder for the death of a single person: *Roche v. State*, 596 N.E.2d 896 (Ind. 1992); *Lewis v. State*, 595 N.E.2d 753 (Ind. App. 1992); *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992) (sentence reversed on other grounds); *Kennedy v. State*, 578 N.E.2d 633 (Ind. 1991) (sentence reversed on other grounds); *Hopkins v. State*, 582 N.E.2d 345 (Ind. 1991); *Tapia v. State*, 569 N.E.2d 655 (Ind. 1991); *Evans v. State*, 563 N.E.2d 1251 (Ind. 1990), rev'd on other grounds, 598 N.E.2d 516; *McMurry v. State*, 558 N.E.2d 817 (Ind. 1990); *Pasco v. State*, 563 N.E.2d 587 (Ind. 1990); *Bustamonte v. State*, 557 N.E.2d 1313 (Ind. 1990); *Thomas v. State*, 562 N.E.2d 43 (Ind. App. 1990); *Lowery v. State*, 547 N.E.2d 1046 (Ind. 1989); *Hicks v. State*, 544 N.E.2d 500 (Ind. 1989); *Ingram v. State*, 547 N.E.2d 823 (Ind. 1989); *French v. State*, 540 N.E.2d 1205 (Ind. 1989); *Rondon v. State*, 534 N.E.2d 719 (Ind. 1989); *Huffman v. State*, 543 N.E.2d 360 (Ind. 1989); *Underwood v. State*, 535 N.E.2d 507 (Ind. 1989); *Martinez-Chavez v. State*, 534 N.E.2d 731 (Ind. 1989); *Watson v. State*, 520 N.E.2d 445 (Ind. 1988); *Mueller v. State*, 517 N.E.2d 788 (Ind. 1988); *Johnson v. State*, 516 N.E.2d 1053 (Ind. 1987); *Boyd v. State*, 494 N.E.2d 284 (Ind. 1986); *Shields v. State*, 493 N.E.2d 460 (Ind. 1986); *Burgans v. State*, 500 N.E.2d 183 (Ind. 1986); *Smith v. State*, 475 N.E.2d 1139 (Ind. 1985); *Newman v. State*, 485 N.E.2d 58 (Ind. 1985); *Robinson v. State*, 477 N.E.2d 288 (Ind. 1985); *Averhart v. State*, 470 N.E.2d 666 (Ind. 1984); *Sandlin v. State*, 461 N.E.2d 1116 (Ind. 1984); *Anderson v. State*, 471 N.E.2d 291 (Ind. 1984); *Ferry v. State*, 453 N.E.2d 207 (Ind. 1983); *Fletcher v. State*, 442 N.E.2d 990 (Ind. 1982); *Williams v. State*, 430 N.E.2d 759 (Ind. 1982); *Pointon v. State*, 408 N.E.2d 1255 (Ind. 1980); *Baldwin v. State*, 411 N.E.2d 605 (Ind. 1980); *Thompkins v. State*, 383 N.E.2d 347 (Ind. 1978).

[13] In *Cichos* the subject of a particular Indiana instructional practice became relevant because "[t]he judge's charge to the jury in . . . [Cichos'] first trial . . . [was] not a part of the record in . . . [the] case [before the Court]." 385 U.S. at 79 n. 4, and the Indiana Supreme Court below had explicitly relied upon " 'the trial court practice of telling the jury to return a verdict on only one of the charges [of involuntary manslaughter and reckless homicide] in view of the limitation on penalty' " pertaining to the latter offense. 385 U.S. at 79. (See note 14 *infra*.) In *Schiro*, where the judge's charge to the jury *is* in the record, this Court needs not resort to any "practice" to ascertain its contents. The preliminary instructions at Schiro's guilt trial appear at J.A. 10-19; the final instructions at the guilt trial appear

and reckless homicide. Those two offenses contained the same elements; the only distinction was the penalty; and at the time of Cichos' trial, juries were required to fix the sentence in their guilt verdict.[14] The practice that developed in this special situation, of instructing juries that they could convict of either involuntary manslaughter or reckless homicide but not both, had no application to separate counts charging *mens rea* murder and felony murder even in the *Cichos* era,[15] let alone since 1977.[16]

b. The court instructed the jury on the law; and the attorneys' summations neither could nor did supersede those instructions.

Disembarrassed from its reliance on a nonexistent "long-standing . . . practice," Respondent's argument that "the

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at J.A. 20-36; plainly, these instructions do *not* tell the jury to return a verdict on only one of the charges of *mens rea* murder and felony murder. Respondent's reliance on *Cichos* would thus be inappropriate even if the "practice" described in *Cichos* with regard to involuntary manslaughter and reckless homicide charges were also the Indiana practice with regard to *mens rea* murder and felony murder charges. But our point in the text is that the two practices are altogether different and that Respondent's attempts to conflate them is indefensible.

[14] Prior to October 1, 1977 the jury was required to "state, in the verdict, the amount of fine and the punishment to be inflicted . . . " Ind. Code § 35-8-2-1 [Burns 1975] (repealed effective October 1, 1977). Effective October 1, 1977 sentencing authority was removed from the jury in non-capital cases and vested in the trial judge. Ind. Code § 35-50-1-1 ("The court shall fix the penalty of and sentence a person convicted of an offense."). The need to instruct the jury to return a single verdict on multiple counts charging the same offense disappeared with the enactment of the new code.

[15] A sampling of single victim murder cases decided under the former Indiana Code, see n. 14, *supra*, reveals that there was no practice of informing juries to return a single verdict when the charges were *mens rea* murder and felony murder. *Birkla v. State*, 425 N.E.2d 118 (Ind. 1981); *Pointon v. State*, 408 N.E.2d 1255 (Ind. 1980); *McCall v. State*, 408 N.E.2d 1218 (Ind. 1980); *Abrams v. State*, 403 N.E.2d 345 (Ind. 1980); *Bonner v. State*, 392 N.E.2d 1169 (Ind. 1979); *McFarland v. State*, 381 N.E.2d 1061 (Ind. 1979); *Carter v. State*, 361 N.E.2d 145 (Ind. 1977).

[16] See notes 12 and 14 *supra*.

Jury's Silence on the 'knowing' Murder Count Did Not Amount to an 'Acquittal' or Other Determination on the Issue of Intent" (Brief of Respondent at 29) amounts to this: Because defense counsel once and the prosecutor twice used the phraseology "one verdict" in their jury summations, the jury was informed that it should return only one of the guilty-verdict forms submitted to it on Counts I, II and III, and should not adjudicate Schiro's guilt or innocence on each count. Respondent makes this argument although the trial court's instructions and the verdict forms themselves are singularly lacking in the slightest hint that the jury is to consider the three separately stated murder charges as mutually exclusive alternatives, and although the trial court charged the jury that "[t]he instructions of the court are the best source as to the law applicable to this case" [J.A. 20], while the attorneys' summations had the following limited functions:

> When the evidence is completed, the attorneys will argue the merits of the case. What the attorneys say is not evidence. ***Their arguments are given to assist you in evaluating the evidence and arriving at correct conclusions concerning the facts,*** but they are also intended to persuade you to a particular verdict; ***and those arguments may be accepted or rejected as you see fit.***

[J.A. 19 (emphasis added)].[17]

Even without this judicial caution, Respondent's reliance upon defense counsel's solitary reference to "one" verdict (Brief of Respondent at 30) could hardly be taken seriously.[18]

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[17] Even the prosecutor told the jury that it was not "[his] intention to tell [the jury] what to do." Brief of Respondent, Appendix A at App 1.

[18] The passage on which Respondent relies, as punctuated by the stenographer, reads as follows:

> "The thing I'd like to maybe do is suggest how you should go about your deliberations. Now, I'm no expert on this. I don't know any better than you all do, but, you'll have to go back there and try to figure out which one of eight or ten verdicts, I believe there are ten, that you will return back into this Court, and I believe the judge will explain every one of them to you, and instruct you on them. And, I think perhaps the best way, maybe you can go about this, is take these issues one at a time, because there's a logical sequence, I think, to them. I think first of all what you ought to do is sit down and decide the issue of insanity, because depending on that, you may just stop there or go on."

Brief of Respondent, Appendix A at App 17. However, the punctuation might as readily be:

> "The thing I'd like to maybe do is suggest how you should go about your deliberations. Now, I'm no expert on this. I don't know any better than you all do, but, you'll have to go back there and try to figure out which one of eight or ten verdicts – I believe there are ten that you will return back into this Court, and I believe the judge will explain every one of them to you, and instruct you on them – and I think perhaps the best way, maybe you can go about this, is take these issues one at a time, because there's a logical sequence I think to them. I think first of all what you ought to do is sit down and decide the issue of insanity, because depending on that, you may just stop there or go on."

And the former punctuation is less plausible, both because it makes the word "that" meaningless and because it disregards defense counsel's subject: the order in which the jury should take up the issues presented.

Respondent's reliance upon two statements by the prosecutor that the jury is "only . . . allowed to return one verdict" (*ibid.*) fares no better when the statements are viewed in their proper context. As this Court noted in *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974), it is all too easy to blow "[i]solated passages of a prosecutor's argument" out of proportion:

> Such arguments, like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; *improvisation frequently results in syntax left imperfect and meaning less than crystal clear.* While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends *an ambiguous remark* to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Id. at 646-647 (emphasis added).

Here, the prosecutor's pair of "one verdict" remarks followed an argument by defense counsel that the jury should

not return a verdict of guilty of felony murder – criminal deviate conduct because the criminal deviate conduct had occurred post mortem. Brief of Respondent, Appendix A at App. 25. The first remark quoted (in part) by Respondent was as follows:

> *Mr. Keating [defense counsel] makes an interesting argument that it isn't criminal deviant conduct to do it to somebody after you've killed them.* Uh, be that as it may, be that as it may, you are only going to be allowed to return one verdict. I didn't tell you about lesser included offenses, because, quite frankly, the State doesn't believe that this is a lesser included offense. I didn't tell you about the difficulties of making those fine line distinctions because I think this is what you call a gross . . . grossly obvious case.

Brief of Respondent, Appendix A at App. 27 (emphasis added).

The second remark, again quoted in part by Respondent, was as follows:

> *Let Mr. Keating [defense counsel] have his argument.* You're only allowed to return one verdict. You can't find him guilty of criminal deviant murder. You can . . . and rape, murder, and murder. *Let Mr. Keating have his argument.* We obviously have proven. . . . I'm sorry, I can't do that. You may find that we have obviously proven that there was a rape. You may find that we have obviously proven at this trial that there was a murder and the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict.

Brief of Respondent, Appendix A at App. 28 (emphasis added).

In context, it is perfectly apparent that the prosecutor was conveying to the jury that it could properly find Schiro guilty of Count II, felony murder – rape, even if it determined that Schiro was not guilty of Count III, felony murder – criminal

deviate conduct. Certainly the point would have been less ambiguous had the prosecutor stated: "You need not return a guilty verdict on each count; you are permitted to return a single guilty verdict" as opposed to "You are only allowed to return one verdict." But the prosecutor's meaning, in context, is the same.

And the jury would most likely have understood the prosecutor's "one verdict" comments in this way. In his initial summation, the prosecutor had urged the jury to reject the consent defense and to return a guilty verdict on both counts of felony murder.[19] It was not until rebuttal argument, after defense counsel invoked Schiro's post-mortem defense to the felony murder – criminal deviate conduct charge, that the prosecutor realized that consent was not the only defense in issue and, accordingly, told the jury that it could return a guilty verdict on one count only.[20]

In summary, Respondent's attempt to lift from a lengthy trial transcript a few ambiguous sentences, decontextualize them, and thereby argue that Schiro's "jury viewed its task as returning a single verdict," Brief of Respondent at 30, is as fanciful and futile a concoction as the fictive "longstanding Indiana trial practice," *ibid.* that Respondent has invented to conceal this maneuver.

2. The issue of Schiro's intent to kill was squarely before the jury.

Respondent claims that Schiro's intent to kill was not before the jury. Brief of Respondent at 32-35. Schiro entered two pleas to the charge counts: insanity and general denial

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[19] The prosecutor stated in initial summation:

> If there is no consent, then you may find defendant guilty of rape, murder. If there is no consent to deviant conduct, you may find the defendant to be guilty of Deviant Conduct Murder.

Brief of Respondent, Appendix A at App 8.

[20] It should also be noted that the prosecutor conjoined the first of his "one verdict" remarks with a reference to lesser included offenses. In that setting, the gist of the remarks would appear to be that the jury was not to return verdicts on the charged offenses and on the lesser included offenses.

[Tr.R 95]. The effect of these two pleas was to place the burden on the state to prove each and every element of the crime charged beyond a reasonable doubt and to require Schiro to prove his insanity by a preponderance of the evidence. Schiro's jury was so instructed. [J.A. 14, 16-17, 21-24]. It does not therefore, "strain[] credulity to suggest, as petitioner does, that the jury [rejected the insanity defense but] nonetheless gave sufficient weight to petitioner's evidence" to find that the state had failed to meet its burden of proving intent to kill beyond a reasonable doubt (Brief of Respondent at 33).

The submission of the lesser included offenses and the arguments on those offenses also placed the issue of Schiro's intent to kill squarely before the jury. The lesser included offenses proffered by the defense were voluntary manslaughter and involuntary manslaughter, Ind. Code § 35-42-1-3 and § 35-42-1-4, respectively. A principal distinction between the lesser included offenses and the *mens rea* murder charge was the requisite intent. Not only did the court believe that the evidence justified placing the lesser included offenses before the jury,[21] but both parties discussed them in summation. Brief of Respondent, Appendix A at App. 24, 27.

Faced with the issue of intent to kill and with separate verdict forms for *mens rea* murder and for two counts of felony murder, the jury found Schiro guilty of felony murder – rape and of nothing else. It thereby did exactly what it intended to do: it acquitted Schiro of *mens rea* murder. The state was barred from seeking Schiro's death by asking the trial judge to relitigate the issue of intent that the jury had

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[21] Under Indiana law, a criminal defendant must meet a heavy burden before he is entitled to instructions on lesser included offenses. *Tawney v. State*, 439 N.E.2d 582, 587 (Ind. 1982) (to justify the giving of a lesser included offense instruction "[i]t is not enough that the lesser offense be included within the offense charged, but there must also be evidence from which the jury could properly find that the lesser offense was committed while the greater was not."); *Hester v. State*, 262 Ind. 284, 315 N.E.2d 351 (1974) (defendant charged with felony murder who alleged insanity as a defense was not entitled to the lesser included offense instruction on the underlying felony as he was either guilty of felony murder or not guilty by reason of insanity).

resolved in Schiro's favor.[22] His death sentence must consequently be vacated.[23]

Respectfully submitted,

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[22] Respondent argues at pp. 31-32 of its brief that instruction number eight, defining *mens rea* murder, which is found at J.A. 22-23, is in fact an instruction applicable to all three murder counts and implies that the jury must have found intent to kill in order to return its guilty verdict on Count II, felony murder – rape. This is another instance of Respondent giving the Court half the relevant text. Instruction number eight advises the jury that intent to kill is a necessary element of "murder." However, there is no conceivable way the jury could, as Respondent suggests, interpret this instruction to apply to all three counts. Respondent ignores that portion of the instruction which provides: "[i]f you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, and that the defendant was not insane at the time of the murder, then you should find the defendant guilty." [J.A. 23]. Since the jury was instructed in both preliminary [J.A. 11] and final instructions [J.A. 21] that the underlying felony was a necessary element of each felony murder count, it is wildly implausible that the jury would have interpreted instruction number eight [J.A. 22-23] as applying to the felony murder counts.

[23] Since this result is required by *Green v. United States*, *Price v. Georgia*, *Ashe v. Swenson*, *Martin Linen Supply Co.*, and *Bullington* – all of which were decided before Schiro's conviction and death sentence became final on direct review – Respondent has no basis for invoking *Teague v. Lane*, 489 U.S. 288 (1989). In any event, Respondent concedes that it "did not raise the [*Teague*] new rule doctrine in the lower courts," Brief of Respondent at 44; if it had done so in the Court of Appeals, that court would have held the issue waived by Respondent's failure to present it in the district court, *Hanrahan v. Greer*, 896 F.2d 241 (7th Cir. 1990); see also *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990); and respondent should hardly be permitted to better its position by sandbagging the Court of Appeals, see *Parke v. Raley*, 113 S.Ct. 517, 521 (1992); *Godinez v. Moran*, 113 S.Ct. 2680, 2685-2686 (1993). See also *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

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APPENDIX

Ind. Code § 35-8-2-1
(repealed effective October 1, 1977)

35-8-2-1 [9-1819]. Verdict – Assessment of fine or punishment. – When the defendant is found guilty the jury, except in the cases provided for, in the next three [two]* sections, must state, in the verdict, the amount of fine and the punishment to be inflicted; where the plea is guilty, or the trial is by the court, the court, subject to the same exception, shall assess the amount of fine and fix the punishment to be inflicted. [Acts 1927, ch. 200, § 1, p. 574.]

***Compiler's Notes**. . . . The bracketed word "two" was inserted by the compiler.

Ind. Code § 35-42-1-3

(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony.

(b) The existence of sudden heat is a mitigating factor that reduces what would otherwise be murder under section 1(1) of this chapter to voluntary manslaughter. *As added by Acts 1976, P.L. 148, SEC.2. Amended by Acts 1977, P.L.340, SEC.27.*

Ind. Code § 35-42-1-4

A person who kills another human being while committing or attempting to commit:

(1) a Class C or Class D felony that inherently poses a risk of serious bodily injury;

(2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) battery;

commits involuntary manslaughter, a Class C felony. However, if the killing results from the operation of a vehicle, the offense is a Class D felony. *As added by Acts 1976, P.L.148, SEC.2. Amended by Acts 1977, P.L.340, SEC.28.*